moment. And for that I apologize, in advance, to Judge Pickering and his family. I thank the Chair and yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I was going to speak first, but I understand the senior Senator from New York, as happens with so many of us, is supposed to be in two places at once. While he is capable of many good things, that is one thing he has not figured out how to do yet.

I yield 5 minutes to the Senator from New York. Once he has finished, I will then speak and answer some of the things that have been said on the other side.

The PRESIDING OFFICER. The Senator from New York is recognized.

Mr. SCHUMER. I thank my colleague for yielding.

Mr. President, this is a difficult decision in a very certain sense. I listened to the sincere words of my colleague from Tennessee. I think they were heartfelt and well spoken. I have tremendous respect for my two colleagues from Mississippi, and I know particularly to my friend Senator LOTT how much this means. He has worked very hard and diligently on behalf of Judge Pickering's nomination.

I must rise to oppose it, and let me explain both to my colleagues and to everybody, I guess, why. I am a patriot. I love America. My family came to this country 5, 3, and 2 generations ago, poor as church mice, discriminated against in Europe. My dad could not graduate from college, and I am a United States Senator. God bless America. What a great country.

I study the history of America. One of the things I try to study is what are our faults, what are our strengths, how do we make sure what happened to the Roman Empire and the British Empire does not happen to this country. One of the most profound scholars who studied America was Alexis de Tocqueville. He came to America in 1832 or so, traveled across the country, including upstate New York, and he wrote a couple of things. First, he wrote then when we were a small nation, not mighty like the great European nations of Britain, France, or Russia. He wrote that we would become the greatest country in the world. That was pretty omniscient. But he also wrote that there was one thing that could do America in, and that was the poison of race.

We have made great progress. We all know it and everybody knows it. Much of the progress was made—all of it just about—in the last 40 years. We did not make much progress from 1865 to, say, 1960 or 1955.

I guess Brown v. Board started the whole wellspring. Frankly, for the first time in my life I am optimistic about racial relations in America. I think, over time, things will heal. I didn't used to think that, even 5 years ago.

But we still have a lot of healing to do, despite the progress. I have to say I don't think the nomination of Judge Pickering—I know he is people's friend; I know lots of fine people think he is a fine man—helps that healing. I think it hurts it. I base my decision not only on his record, which—I would have to disagree, in all due respect, with my friend from Tennessee—on race issues is, at best, mixed. The cross-burning case bothers me greatly because if you are sensitive to race, even if you think a case was wrongly decided, you don't go through the extra legal means, on a cross-burning case, to do what you have to do.

Does that mean a person should be put in jail or excoriated? No. Does it mean if he runs for public office that he is going to lose? No.

But on the Fifth Circuit, the circuit that has had the great names at healing race and racial divisions that my colleague from Tennessee mentioned, should not we be extra careful about trying to bring a unifying figure to that bench, particularly when it represents more minorities than any other?

The bottom line is, while we can find individual names, to me it is overwhelmingly clear that the Black community in Mississippi—which ought to have pretty good judgment about who did what, when, and how far we have come—is quite overwhelmingly against Judge Pickering.

You can say it is politics. But when we hear the head of the NAACP say, as he told us yesterday, that every single chapter—I don't remember how many there were, like 140—were against Judge Pickering, that means something. When you hear that all but a handful of the Black elected officials in Mississippi are against Judge Pickering, that means something.

Frankly, in this body we don't have an African American to give voice to their view, the African American view, diverse as it is, about whether Judge Pickering is a healing figure and deserves to be on this exalted circuit. We are not demoting him. We are not excoriating him. We are debating whether he should be promoted to this important bench, particularly when it comes to race and civil rights. And the overwhelming voice is no.

I ask unanimous consent from my colleague to be given an additional 3 minutes.

Mr. LEAHY. I yield another 3 minutes to the distinguished Senator from New York.

The PRESIDING OFFICER (Mr. ENZI). The Senator from New York is recognized.

Mr. SCHUMER. So the overwhelming voice is no. The elected Black officials of Mississippi—I don't know the percentage, but I think it is against him. The only Black Member of Congress speaks strongly against him. He doesn't just say, well, I wouldn't vote for him, but it is an either/or situation, and that has to influence us. It is not dispositive. People can say ''these groups.'' Well, the NAACP is not just a group. It has been the leading organization. It is a mainstream African-American organization.

There are groups on the other side lobbying for Judge Pickering. There are groups on this side against. I don't know why my colleagues, some on the other side, say the groups that lobby against what they want are evil, and the groups that lobby for are doing American justice. That is what groups do, and we listen to them sometimes.

I, from New York, don't know that much about this. I try to study history, but I haven't lived there. I haven't gone through the history that my colleagues from Mississippi or Tennessee have. But I have to rely on other voices as well.

So the fork in the road we come to here is this: On this nomination in this important circuit which has, indeed, done so much to move us forward—and I do believe we will continue to move forward as a country; even as Alexis de Toqueville said, on the poison of race—do we appoint a man who, on racial issues, has a record that at best is mixed, and who recently, at a very minimum, has shown insensitivity on the cross-burning case? Sure, there was a disparity of sentence. One thing I know quite well, in criminal law there are always disparities of sentence when there is a plea bargain, and prosecutors always go to someone in the case and say: If you plea bargain, you will get fewer years than if you don't. So that is not a great injustice. It happens every day in every court in this land. On this particular case, that is where Judge Pickering's heart was, to take it to a higher level. It is bothersome, particularly when it comes to nominating someone, not just to be a district court judge—which he is now—but nominated to the exalted Fifth Circuit, the racial healer in America for so long.

So in my view—no aspersions to my colleagues from Mississippi who feel so strongly about this; no aspersions to my colleague from Tennessee who was eloquent, in my opinion; and no aspersions to Judge Pickering as well—but we can do better, particularly on the Fifth Circuit, when it comes to the issue of race, which has plagued the regions of the Fifth Circuit and plagued my region as well. We can do better.

I urge this nomination be defeated.

(At the request of Mr. DASCHLE, the following statement was ordered to be printed in the RECORD.)

● Mr EDWARDS. Mr. President, I rise today to speak against the nomination of Charles Pickering to the U.S. Court of Appeals for the Fifth Circuit.

I oppose this nomination because Judge Pickering has repeatedly demonstrated a disregard for the principles that protect the rights of so many of our citizens. Judge Pickering's record as a judge is full of instances in which he has elevated his personal views above the law. For example, Judge Pickering has shown a lack of respect for the Supreme Court's landmark

legal precedents, especially those that protect rights. He has harshly criticized the Supreme Court's ''one person, one vote'' rulings and has been reversed numerous times by the Fifth Circuit Court of Appeals for his failure to follow ''well-settled principles of law.''

In one case, Judge Pickering took extraordinary steps to reduce the sentence required by law for a man convicted of cross burning. In addition, he exerted extraordinary efforts to reduce the 5-year sentence mandated by Federal sentencing guidelines in the cross-burning case and went so far as to make an ex parte phone call to Justice Department officials in an attempt to assist the defendant.

And, since his hearing, Judge Pickering has actively solicited the support of this nomination from attorneys who appear in his courtroom. This behavior not only calls into question Judge Pickering's commitment to protecting the constitutional rights of all Americans, but legal experts agree that his actions violated the canons of judicial ethics.

Unfortunately, some of our colleagues on the other side of the aisle, in their drive to push through every Bush judge at all costs, have turned this process into a personal attack on the integrity and motivations of those of us who oppose this nomination. We have been accused of anti-Southern bias. Of course, anyone listening to me talk would have to figure that I am the last person to hold an anti-Southern bias.

We have even been accused of calling Judge Pickering a racist, something we have not done. I do not presume to know what is in Judge Pickering's heart. But I do know what is in his record. That record proves him unfit to serve as a Court of Appeals judge.

We have tried our best to facilitate consensus and cooperation in judicial nominations. Unfortunately, most of our efforts are being rejected, which doesn't make a bit of sense, since we accomplish so much when we all work together.

We have seen what happens when the President meets us halfway. He has done it before—rarely, but he has done it. He reached out to us on Allyson Duncan, an outstanding North Carolinian who just yesterday was formally installed as a judge on the Fourth Circuit Court of Appeals, breaking a log-jam that had held our State back for a decade.

In that case, President Bush did more than just pay lip service to our constitutional obligation to advise and consent. He reached out to us before he made his decision. He consulted with us. He sought our advice. And in making his decision, the President selected a nominee who represents the mainstream of our State.

Throughout Judge Duncan's confirmation process, I commended the President for consulting with us and making an excellent nomination. And I told him that if he takes this approach to future judicial nominations we have a real opportunity to find common ground in the search for excellence on the federal bench. When we work together, we find outstanding nominees like Allyson Duncan, who represents the best of North Carolina and America.

But rather than accept my call for consensus, the President just said no.

There is a saying that if you see a dog and a cat eating from the same dish, it might look like a compromise, but you can bet they are eating the cat's food. That is how things seem to be working in Washington these days. My colleagues and I have tried and tried to find common ground. We have said yes to Bush judges, time after time after time. We have said yes to more than 160 Bush judges. But but my colleagues on the other side of the aisle have instead dug in their heels and demanded that unless we agree to every judicial nominee the President sends up here, no matter how unacceptable they are, we are being obstructionist.

We can do better than this. And we should do better. It is time for this President to stop saying no to judges who respect our civil rights. Let's say yes to judges who will fairly apply the law. Let's say yes to judges who will not allow their extreme personal views to color their decision-making. Let's say yes to judges who will protect our civil rights. I am proud to stand with my colleagues today as we say a resounding yes to fairness, equality and justice.●

Ms. CANTWELL. Mr. President, Federal judges serve lifetime terms, and are responsible for interpreting our Constitution, and our laws, in ways that have real implications for the rights of regular Americans. Last year I joined my colleagues on the Judiciary Committee in voting not to report the nomination elevating Federal District Court Judge Charles Pickering to the Circuit Court of Appeals to the Senate floor. I stand by that vote. I continue to have very real concerns about Judge Pickering's ability to be a fair and neutral Court of Appeals judge.

In evaluating judicial nominations, among the factors I consider are whether the nominee demonstrates the highest level of professional ethics and integrity, and has the ability to distinguish between personal beliefs and interpreting the law. Unfortunately, I believe Judge Pickering falls short in meeting these criteria. Judge Pickering is an honorable person, but he is simply the wrong person to fill this very important position.

Like my colleagues, I am troubled by Judge Pickering's handling of the case of United States v. Swan, where a white defendant was tried for burning a cross on the lawn of an interracial couple. Judge Pickering had multiple ex parte conversations with prosecutors and Justice Department officials in an effort to reduce the sentence of Mr. Swan. In doing so, Judge Pickering seems to have lost sight of the ethical limitations on his actions, and the extent to which he was failing to maintain judicial independence. As Brenda Polkey, the victim of the cross burning, said, her ''faith in the justice system was destroyed'' by Pickering's efforts to reduce Mr. Swan's sentence. In every aspect of government we need to work hard and keep faith with the public.

This case indicates how deeply held Judge Pickering's views are, and how far he will go to arrive at an outcome he believes to be correct. The difficulty that he has in keeping his personal views out of his judicial decision-making are obvious, not only in this case, but in several opinions in which he goes beyond the facts of the case to state his belief of what the law ought to be. Judge Pickering's efforts to solicit letters of support from lawyers appearing before him in direct violation of the canons of judicial ethics is another example of his lack of understanding and adherence to the ethical guidelines that are critical to maintaining the independence and integrity of the Federal judiciary.

Because of this troubling record of not following precedent, and of overstepping ethical bounds to achieve a particular outcome, I asked Judge Pickering questions at his hearing that focused on the right to privacy. I asked Judge Pickering about privacy as it pertains to consumers' rights, specifically medical and financial records, as it pertains to an individual's right to privacy in the context of government surveillance, and with regard to a woman's right to make personal decisions about her body. In response, he declined to state whether he believed that any right to privacy was conferred by our Constitution.

While my concern about how Judge Pickering would rule on cases of fundamental privacy rights is not the only factor in my decision to oppose his elevation to the Circuit Court, it is one I believe is important.

The Fifth Circuit covers three States—Louisiana, Texas and Mississippi—that have passed more anti-choice legislation restricting a woman's right to make personal choices about her own body than any other States. In fact, all three States continue to have unconstitutional and unenforceable laws on their books prohibiting a woman from having an abortion, because the legislature in each of these States will not repeal the laws. This is the context against which we must consider the President's nomination of Judge Pickering.

While Judge Pickering has repeatedly pledged to restrain his personal ideological views and follow the precedent of the Supreme Court, given the unique role that the Fifth Circuit plays in protecting not only the constitutional right to privacy enunciated in Roe and affirmed in Casey, but also in protecting women's access to abortion providers in the States with the Fifth

Circuit, I am concerned about Judge Pickering's willingness to say where in the Constitution privacy is protected and his willingness to follow the law.

Judge Pickering's actions on the bench reveal a lack of understanding of the requirements of judicial ethics and a failure to meet the very highest standards of the legal profession. Judge Pickering has exhibited a lack of ability to distinguish his personal believes from judging the issues before the court, and I therefore cannot support his elevation to the Fifth Circuit.

Mr. FEINGOLD. Mr. President, I will vote no on cloture on the nomination of Charles Pickering to be a judge on the U.S. Court of Appeals for the Fifth Circuit.

We had a fair process in the last Congress on this nominee—two hearings, a lengthy period of deliberation and debate, and a fair vote. The nomination was defeated. The Judiciary Committee's consideration of this nomination was thorough and fair. Obviously, some did not like the result, but I do not think they can in good faith find fault with the process.

It is my view that a process that gives a nominee a hearing, and then a vote in the Judiciary Committee is not an unfair process, or an ''institutional breakdown,'' as some critics of our work in the committee last year called it. It is the way the Judiciary Committee is supposed to work. During the 6 years prior to last Congress, the Judiciary Committee did not work this way. Literally dozens of nominees never got a hearing, as Charles Pickering did, and never got a vote, as Charles Pickering did. Those nominees were mistreated by the committee; Charles Pickering was not. What happened in the Judiciary Committee last year provides no justification whatsoever for the President's unprecedented action of renominating someone who has been considered by the committee and rejected.

Judges on our Federal courts of appeals have an enormous influence on the law. Whereas decisions of the district courts are always subject to appellate review, the decisions of the courts of appeals are subject only to discretionary review by the Supreme Court. Because the Supreme Court agrees to hear only a very small percentage of the cases on which its views are sought, the decisions of the courts of appeals are in almost all cases final. That means that the scrutiny that we in the Senate and on the committee give to circuit court nominees must be greater than that we give to district court nominees.

I would think that this would be self-evident, and certainly the debates over circuit court nominees over the years have been much more heated than those relating to district court nominees. But I begin with this point because there are some who have argued that because the Senate confirmed Judge Pickering to the district court by a unanimous vote in 1990, he must be elevated to the circuit court.

Judge Pickering now has a substantial record as a district court judge that he did not have in 1990, and Senators are entitled—indeed it is our duty—to review and evaluate that record. Even leaving that aside, a court of appeals judgeship is different from a district court judgeship.

There is another factor that I think requires us as a committee to give this nomination very careful consideration. During the last 6 years of the Clinton administration, this committee did not report out a single judge to the Fifth Circuit Court of Appeals. That is right. Not a single one.

And as we all know, that was not for lack of nominees to consider. President Clinton nominated three well-qualified lawyers to the Court of Appeals—Jorge Rangel, Enrique Moreno, and Alston Johnson. None of these nominees even received a hearing before this committee. When the chairman held a hearing in July 2001 on the nomination of Judge Clement for a seat on this circuit court, only a few months after she was nominated, it was the first hearing for a Fifth Circuit nominee since September 1994. We have since confirmed another Fifth Circuit nominee, Edward Prado.

So there is a history here and a special burden on the administration to consult with our side on nominees for this Circuit. Otherwise, we would simply be rewarding the obstructionism that the President's party engaged in over the last 6 years by allowing him to fill with his choices seats that his party held open for years, even when qualified nominees were advanced by President Clinton. And I say once again, my colleagues on the Republican side bear some responsibility for this situation, and they can help resolve it by urging the administration to address the injustices suffered by so many Clinton nominees.

With that background, let me outline the concerns that have caused me to reach the conclusion that Judge Pickering should not be confirmed. Except for the DC Circuit, the Fifth Circuit has the largest percentage of residents who are minorities of any circuit—over 40 percent. It is a court that during the civil rights era issued some of the most significant decisions supporting the rights of African American citizens to participate as full members of our society. It is a circuit where cases addressing the continuing problems of racism and discrimination in our country will continue to arise.

Judge Pickering's record as a Federal district court judge leads me to conclude that he does not have the dedication to upholding the civil rights laws that I believe a judge on this circuit must have. Judge Pickering has a disturbing habit of injecting his own personal opinions about civil rights laws into his opinions and of criticizing plaintiffs who seek through legal action to correct what they perceive to be discriminatory conduct. In two separate opinions in unrelated employment discrimination cases, Judge Pickering not only found against the plaintiffs but saw fit to disparage their claims in identical language. This is what he said:

> The fact that a black employee is terminated does not automatically indicate discrimination. The Civil Rights Act was not passed to guarantee job security to employees who do not do their job adequately. . . . The Courts are not super personnel managers charged with second guessing every employment decision made regarding minorities. The Court should protect against discrimination but it can do no more. This case has all the hallmarks of a case that is filed simply because an adverse employment decision was made in regard to a protected minority.

The use of this kind of language as a boilerplate does not indicate to me a judge who has an open mind about employment discrimination lawsuits. I think that people who have legitimate claims under the civil rights laws of this country have reason to be concerned about whether a judge who would go out of his way to say these kinds of things in legal opinions will hear their cases fairly.

Indeed, during his confirmation hearing, Judge Pickering seemed to confirm that he has a predisposition to believe that employment discrimination claims that come before him are not meritorious. He testified that as he understands the law, the Equal Employment Opportunity Commission ''engages in mediation and it is my impression that most of the good cases are handled through mediation and are resolved.'' He went on to say, ''The cases that come to court are generally the ones that the EEOC has found are not good cases, so then they are filed in court.'' That is emphatically not the law, and it was extremely disturbing that a sitting federal judge who has ruled in numerous employment discrimination cases would so profoundly misunderstand the role of the EEOC in these cases.

Judge Pickering has also expressed troubling views in voting rights cases, including criticizing the concept of ''one person, one vote.'' That concept is one of the bedrock constitutional foundations of our political system. Judge Pickering opined in one case: ''It is wondered if we are not giving the people more government than they want, more than is required in defining one man, one vote, too precisely.'' I do not believe that we can give the people too much democracy, and I am not inclined to elevate to a higher court a judge who seems not to take this constitutional principle seriously.

Another area of the law where Judge Pickering has demonstrated what seems like a hostility to certain kinds of claims is that of prisoner litigation. We all know that there is a significant problem of frivolous lawsuits being filed by prisoners. Congress addressed this problem in 1996 with the Prisoner Litigation Reform Act, where it provided certain sanctions for prisoners who file repeated frivolous claims. Judge Pickering, however, has taken

the law into his own hands on numerous occasions by threatening to order prison officials to restrict prisoners' privileges if they filed another frivolous lawsuit. And he did this even after Congress specified certain sanctions for repeated frivolous lawsuits in the 1996 Act.

I believe that this kind of threat is inappropriate behavior for a Federal judge. Judge Pickering's opinions could not help but chill even legitimate complaints from prisoners. While it is true that much frivolous litigation is filed by prisoners, it is also true that some celebrated cases upholding and explaining the constitutional rights of the accused have had their genesis in a prisoner complaint where the prisoner did not have a lawyer. Gideon v. Wainwright, which established the right to an attorney, was such a case. Just the day before Judge Pickering's second hearing, the Washington Post ran a story about a prisoner who received a favorable Supreme Court decision in a case that began with such a complaint. And the petition for certiorari was filed by the prisoner without a lawyer, as well. I believe that judges at all levels must have an open mind toward all types of cases. Engaging in tactics that will frighten people into not asserting their rights is a highly questionable thing to do.

Judge Pickering did respond to my written questions about his decisions in prisoner litigation. I was gratified to learn that he never actually imposed the sanctions he threatened, and I appreciate his and the Justice Department's efforts to find legal authority for his orders. I find those efforts unconvincing, particularly with respect to the orders that he entered after Congress passed the Prisoner Litigation Reform Act. Judge Pickering states in answer to my questions that ''[m]y objective was to stop prisoners who were filing frivolous litigation from doing so,'' and that ''I do not believe that legitimate complaints by prisoners were chilled by this approach.'' I simply do not know how Judge Pickering could be so certain now, or when he was making these orders, that threatening to order prison officials to take away unspecified privileges if a prisoner filed another frivolous complaint was a tactic that would discourage only frivolous suits by prisoners, but not legitimate ones.

I also have concerns about two different ethical issues that arose during the consideration of his confirmation. I questioned him about one such issue at his second hearing before Judiciary Committee last year. After his first hearing, Judge Pickering asked a number of lawyers who practice before him to submit letters of recommendation. He asked them to send those letters to his chambers so that he could fax them to Washington. And he testified that he read the letters before forwarding them to the Justice Department, which sent them on to the committee. Now when I asked Judge Pickering about this, he seemed confused by the questions, as if he thought I was objecting to the fact that the letters had been faxed rather than mailed. Let me be clear, I have no problem with faxes. I get them all the time. What I do have a problem with is a sitting Federal judge asking lawyers who practice before him to send letters supporting his nomination to a higher court and having those letters sent to him rather than directly to the Justice Department or the Senate. That seems to raise an obvious ethical issue, and I was surprised that Judge Pickering didn't recognize it, even when I questioned him about what he did.

I asked Professor Stephen Gillers of NYU Law School, one of the leading experts on legal and judicial ethics in the country, for his views on this issue. Professor Gillers responded in a letter to me. He confirmed my concern about Judge Pickering's actions. Let me read a portion of that letter. Professor Gillers wrote:

> It was improper for Judge Pickering to solicit letters in support of his nomination from lawyers who regularly appear before him. It is important to my answer that the Judge asked the lawyers to fax him the letters so that he could send them to the Justice Department for transmittal to the Senate. He did not ask the lawyers to send any letters directly to Washington. Consequently, the Judge would know who submitted letters and what the letters said, as would be obvious to the lawyers.

Last year, Senator HATCH obtained a letter on this issue from a professor Richard Painter. Professor Painter answers only the question of whether soliciting letters of support violates existing rules of judicial conduct and never mentions the additional fact that Judge Pickering asked for the letters to be sent to him rather than to the Senate. That makes Professor Painter's views much less relevant to the questions I asked.

Furthermore, Professor Painter's analysis seems to be limited to an effort to show that the authorities relied upon by Professor Gillers are not exactly on point and that the standards governing the solicitation of letters of support for nominations are vague. He argues that the rules should be clarified and made more specific. And perhaps he is right about that. But it seems to me to be an insufficiently low standard to set that judges need only make sure they don't clearly violate the ethical rules. We should not want judges who simply avoid clear violations of rules of ethical conduct. We should not want judges who either don't spot ethical issues or treat them as obstacles to be parsed and tiptoed around. We should want judges who are beyond reproach, who know that ethical conduct is at the core of their responsibilities, because such conduct helps ensure that the public will respect their decisions. I believe that Judge Pickering's conduct fell far short in this instance.

Before this year's committee vote on Judge Pickering, some additional information came to light on this matter that suggests that Judge Pickering's conduct presents even more serious ethical questions. In his response to my inquiry about Judge Pickering's solicitation of letters of support, Prof. Gillers also noted the following:

> The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited. Then the desire to please the Judge would be immediately obvious and the coercive nature of the request even more apparent. In addition, soliciting favorable letters from lawyers or litigants in current matters could lead to recusal on the ground that the Judge's ''impartiality might reasonably be questioned.'' 28 U.S.C. § 455(a).

We identified 18 separate letters, all written in late October 2001, that came to the committee from Judge Pickering's chambers. We now know that at least seven of the lawyers who wrote letters on behalf of Judge Pickering at his request actually had cases pending before him at the time. A number of those lawyers had more than once case pending. One lawyer received Judge Pickering's request for a letter when a previously scheduled settlement conference was a little over a month away. Another lawyer whom Judge Pickering solicited represented the plaintiffs in a class action against a major drug company. The defendant filed a motion to dismiss for lack of personal jurisdiction in May 2001, and the motion was still pending before Judge Pickering when he requested the letter.

Now I have to ask my colleagues: Suppose you were a lawyer in a case and your opponents filed a motion trying to get your case dismissed. The judge has not yet ruled on the motion and you get a call from him asking you to write a letter of recommendation because he has been nominated to serve on a higher court. What would you do? Wouldn't you be troubled? Wouldn't you feel at least a bit of pressure to comply? And would you write a fully candid letter, especially if the judge asked you to send the letter to him directly so he could see it before forwarding it to the Judiciary Committee?

I will submit for the RECORD a chart indicating the lawyers with cases pending before Judge Pickering who wrote letters for him upon his request. I consider this a very serious ethical breach, and Prof. Gillers agrees. This violation of judicial ethics casts serious doubt on Judge Pickering's fitness to serve on the Court of Appeals.

It is within this framework that I evaluate the other ethical issue that has arisen, Judge Pickering's conduct in the Swan cross-burning case. This case and Judge Pickering's handling of it have been the subject of a great deal of controversy and public discussion, and I will not repeat the details. I will only say that I am very troubled by the Swan case, for a number of reasons. Judge Pickering, it seems to me, improperly stepped out of his judicial role, to try to get a result that he favored in the case. He had an ex parte

contact with the Justice Department about the case. He threatened to rule on a legal issue in a way that he apparently did not believe was correct if the Justice Department did not change its sentencing position. He twice told the Justice Department that he might order a new trial even though it was clearly outside of his authority to do so. And he took unusual and apparently unjustified steps to keep his order secret, which prevented public scrutiny of his actions.

Judicial nominations should not be like legislation that can be reintroduced and reconsidered by a succeeding Congress. The Senate, acting through this committee, and exercising its constitutional responsibility, refused to give its consent to this nomination last year. I believe it was wrong for the President to re-nominate Judge Pickering.

I do not believe Judge Pickering is a racist, nor do I believe that he is a bad person. I did not come to this decision to vote against his confirmation lightly or because of pressure from interest groups or other Senators. I sincerely believe that Judge Pickering is not the right choice for this position. I wish him well in his continued work on the district court.

Mr. President, I ask unanimous consent to print in the RECORD the letter to which I referred.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

NEW YORK UNIVERSITY,
SCHOOL OF LAW,
New York, NY, February 20, 2002.

Hon. RUSSELL D. FEINGOLD,
U.S. Senate,
Washington, DC.

DEAR SENATOR FEINGOLD: I am replying to your inquiry of February 12, 2002. I assume familiarity with Judge Pickering's testimony and will address the two questions you ask. I address only these questions. I take no position on whether Judge Pickering should be confirmed for the Fifth Circuit or the weight, if any, that should be given to my analysis. Obviously, many facts are relevant to a confirmation vote.

It was improper for Judge Pickering to solicit letters in support of his nomination from lawyers who regularly appear before him. It is important to my answer that the Judge asked the lawyers to fax him the letters so that he could send them to the Justice Department for transmittal to the Senate. He did not ask the lawyers to send any letters directly to Washington. Consequently, the Judge would know who submitted letters and what the letters said, as would be obvious to the lawyers.

I will assume initially that none of the lawyers whose letters the judge solicited had current cases pending before the judge. If a solicited lawyer (or litigant) did have a pending matter, the situation is more serious, as discussed further below.

Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. This document, based on the A.B.A. Code of Judicial Conduct, contains the ethical rules that apply to all federal judicial officers below the Supreme Court.

Judge Pickering's conduct creates the appearance of impropriety, in part, because of the power federal judges, and particularly federal trial judges, have over matters that come before them. Federal judges enjoy a wide degree of discretion, which means that many of their decisions will be upheld absent an abuse of discretion. This is a highly deferential standard. It means that for many decisions, the district judge is the court of last resort and lawyers know that.

Given this power over their cases, and therefore over the lawyers whose cases come before them, ethics rules for judges forbid them to make certain requests of lawyers and others that ''might reasonably be perceived as coercive.'' Canons 4(C); 5(B)(2). These particular Canons deal with soliciting charitable contributions. They absolutely forbid the judge ''personally'' to participate in charitable or other non-profit fundraising activities. They also forbid participation in ''membership solicitation'' that ''might reasonably be perceived as coercive.'' A narrow exception is made for fundraising from other judges ''over whom the judge does not exercise supervisory or appellate authority.'' Canon 4(C).

In these situations, of course, the judge would be soliciting a benefit for an organization, and not, as here, for the judge himself. That difference makes the present case more troubling because a judge would ordinarily have a greater, and certainly a personal, interest in a significant promotion than he or she would have in a contribution to an organization with which the judge is affiliated.

Judge Pickering's solicitations was ''coercive'' because a lawyer who regularly practices before him was not free to fail to provide a letter endorsing Judge Pickering's promotion. Given the risk to lawyers' (and their firms') clients—a risk they would readily perceive—lawyers would feel coerced to comply with the Judge's solicitation of letters and in fact to exaggerate their support for the Judge.

I do not suggest that Judge Pickering would actually retaliate against a non-complying lawyer or his or her clients. Nor should the word ''coercive'' be understood to describe the Judge's subjective intent. Canon 2 tells judges to ''avoid . . . the appearance of impropriety in all activities.'' In evaluating Canon 2, we use an objective standard. We do not ask whether Judge Pickering would in fact ''punish'' a recalcitrant lawyer or what was really on his mind. We should not have to make that inquiry. We focus on the situation itself and how it will appear to the public.

Directly on point is Advisory Opinion 97 (1999), which I attach. It was written by the Committee on Codes of Conduct of the Judicial Conference of the United States (the body of federal judges that interprets the Code of Conduct in response to questions from judges). The Committee was asked whether and when a person being considered for the position of U.S. Magistrate, or for reappointment to that position, must recuse himself or herself under the following circumstances.

Initial appointments as a magistrate judge are made by district judges from a list compiled by a panel of lawyers and others. Identity of the members of the panel is public. Reappointments as a magistrate judge are made following a report of the same kind of panel.

The Committee wrote in Opinion 97 that a person appointed or reappointed as a federal magistrate judge did not have to recuse himself or herself from sitting in a case where a lawyer before the magistrate judge had been on the panel recommending the appointment or reappointment. But the opinion emphasized that the panel ''operates under a requirement of strict confidentiality,'' so that the candidate was ''privy to the individual opinions of the panel members concerning any candidate.'' If this were not so for a particular panel member, recusal might be required. (The Opinion states: ''Of course, in the unlikely event that during the selection process something were to occur between a panel member and the magistrate judge that bears directly on the magistrate judge's ability to be, or to be perceived as being, fair and impartial in any case involving that panel member, then the facts on that particular situation would have to be evaluated by the magistrate judge to determine if recusal is an issue and if notification should be provided to the parties.'') In the situation you present, Judge Pickering removed the opportunity for confidentiality by having the lawyers' letters sent directly to him for transmittal to Washington.

The testimony does not clarify whether any of the lawyers or litigants whom Judge Pickering solicited had current matters pending before him. The only reference to this issue is at line 23 on page 81, where you ask whether ''present or former litigants, parties in cases that you handled'' were asked to write letters. Judge Pickering answered ''some.'' This is ambiguous.

The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited. Then the desire to please the Judge would be immediately obvious and the coercive nature of the request even more apparent. In addition, soliciting favorable letters from lawyers or litigants in current matters could lead to recusal on the ground that the Judge's ''impartiality might reasonably be questioned.'' 28 U.S.C. §455(a). As stated below, judges are instructed to avoid unnecessary recusals.

In Opinion 97, the Committee addressed the situation where a lawyer currently appearing before a magistrate judge was simultaneously sitting on a panel considering whether to recommend the same judge's reappointment. The Committee concluded that while the issue of the magistrate judge's reappointment was under consideration by a panel, the judge should not sit in any matter in which a lawyer on the panel represented a party. This was true even though the lawyer's own position on the panel was confidential and unknown to the judge. (The Opinion states: ''Therefore, in the opinion of the Committee, during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge's ability to carry out judicial responsibilities with impartiality is impaired in any case involving an attorney or a party who is a member of the panel.'') Here, of course, the situation is more serious because Judge Pickering would know what, if anything, a lawyer wrote.

Opinion 97 is consistent with court rulings that have disqualified judges, or reversed judgments, when the judge, personally or through another, was exploring the possibility of a job with a law firm or government law office then appearing before him. See, e.g., Scott v. U.S., 559 A.2d 745 (D.C. 1989) (conviction reversed where judge was negotiating at the time for a job with the Justice Department). Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985) (judge disqualified after headhunter for judge contacted law firms appearing before judge). Recusal has also been required where the judge's contact with a litigant or lawyer in a pending case was not employment-related but was otherwise viewed as favorable to the judge. Home Placement Service, Inc. v. Providence Journal Co., 739 F.2d 671 (1st Cir. 1984) (recusal required where judge cooperated with a newspaper reporter in a complimentary article about the judge and his wife while newspaper's case was pending before judge).

The Code of Conduct for U.S. Judges requires judges to refrain from activity that could lead to unnecessary recusal. Canon 3 states that the ''judicial duties of a judge takes precedent over all other activities.'' Canon 5 instructs judges to ''regulate extrajudicial activities to minimize the risk of conflict with judicial duties.'' Opinion 97 and the cases cited would have given a current litigant who did not write (or whose lawyer did not write) a letter recommending the Judge a strong legal basis to seek to recuse the Judge in the litigant's case. A litigant whose case came before the Judge reasonably soon thereafter, but whose lawyer had not written a letter in response to the Judge's earlier request (as the Judge would be aware), would also have a basis for a recusal motion.

I hope this letter assists your important work.

Sincerely yours,

STEPHEN GILLERS.

Mr. KOHL. Mr. President, today we are considering the nomination of Charles Pickering to the Fifth Circuit Court of Appeals. Despite the fact that the Judiciary Committee rejected his confirmation little more than 18 months ago, the President has seen fit to renominate Judge Pickering for this appellate court judgeship. But nothing that has occurred in the last year should alter our conclusion that we should not confirm Judge Pickering.

The President's decision to again advance Judge Pickering's nomination at this time is hard to understand. Had new facts come to light regarding Judge Pickering's qualifications or record which assuaged our doubts concerning his fitness for this judgeship, or new explanations emerged for his rulings and actions while a district judge, we could understand the President's decision to renominate him. But absolutely nothing of the kind has happened. His record was scrutinized at length and in detail by this Committee last year, and a majority found it deficient. Rather than examining the qualifications and record of a new nominee, we are once again rehashing the already well-documented and well-established problems with this nominee. And our conclusion today is the same as it was last year—Judge Pickering does not warrant a promotion to the Fifth Circuit.

As Judge Pickering's record became known last year, we grew more and more concerned about his ability to apply and make the law without interjecting his strongly held opinions. Many of Judge Pickering's decisions are far outside of the mainstream and appeared to be motivated by a rigid ideological agenda. For example, he has shown an unrelenting hostility to persons bringing cases of employment discrimination on the grounds of race, ethnicity or gender. In voting rights cases, he has demonstrated a callous attitude toward the core democratic principle that every vote must count.

And we are all aware of Judge Pickering's disgraceful actions to reduce the sentence of a man convicted burning a cross in the front lawn of an interracial couple. Judge Pickering's extraordinary behavior on behalf of a defendant in a cross-burning case seriously calls into question his impartiality, his judgment, and his fitness to serve as an appeals court judge. This incident looks no better today than it did 18 months ago.

We are further troubled by Judge Pickering's continued active solicitation of support of letters of recommendation from lawyers practicing before him. Judge Pickering admitted at his confirmation hearing last year that he asked several lawyers who practiced before him to write letters of support and to send those letters to his chambers so that he could send them on to the Justice Department. This conduct obviously constitutes an abuse of a judge's position. Even after hearing the ethical concerns of many last year, he has continued this inappropriate practice. Such plain disregard for judicial proprieties and ethics speaks loudly against promoting Judge Pickering to the Fifth Circuit.

The deficiencies in Judge Pickering's record are particularly intolerable in a candidate for an appellate judgeship. Once confirmed to their positions for life, federal judges are unanswerable to the Congress, the President, or the people. But this fact has special force when we are considering an appellate court nominee. On the circuit court, a judge enjoys the freedom to make policy if he chooses with little concern of being overruled. Subject only to the infrequent review by the Supreme Court, Court of Appeals judges are the last word with respect to our liberties, our Constitution, and our civil rights.

I also should stress that I do not oppose Judge Pickering because his political views might be different than mine. The President has a right to appoint judges of his own political leanings. But in the case of Judge Pickering, it appears his ideology is so strong, and his convictions so settled, as to interfere with his ability to fairly dispense justice and protect the rights of the most vulnerable in our society. Judge Pickering's record as a judge over the past decade has called into question whether he can enter the courtroom and apply the law fairly, objectively, and without prejudice. This reason alone compels us to oppose his nomination.

I must also dissent from the charge that filibustering this nomination is an abuse of our Constitutional duty to advise and consent. While such a step is not—and should not—be done routinely, filibusters of judicial nominations have been undertaken under the leadership of both parties several times in recent years. This does not even take into account the silent filibuster known as a ''hold''—often anonymous—which permits one objector to block consideration of a judicial nominee. President Clinton's nominees were routinely defeated by anonymous holds. And those holds only defeated the nominees who were lucky enough to even get a hearing and a committee vote. In the case of Judge Pickering, his candidacy has been reviewed and debated twice by the Judiciary Committee. Plainly he has received fair consideration of his nomination.

Judge Pickering is simply unfit for promotion to the U.S. Court of Appeals for the Fifth Circuit. No new facts have come forward which justifies reconsideration of the Judiciary Committee's decision to reject his nomination last year. For these reasons, I must vote against cloture on his nomination.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, over the years, I have spoken many times in the Chamber. In 29 years I have spoken on everything from arms control treaties to relatively routine matters. In this particular case, I come here with mixed feelings. The Senator from New York spoke about his two friends from Mississippi, and that does bother me because the Senate—and I believe I am very much a creature of the Senate—on many issues, gets along with comity. The Senators from Mississippi are both good friends.

I consider the senior Senator from Mississippi, Mr. COCHRAN, one of my closest friends in this body. We traveled together in Mississippi, in Vermont, abroad, and we have always worked closely together on everything from appropriations to agricultural matters.

Senator LOTT has always been very courteous to me and is a good friend. We even compare photographs of our grandchildren. I think we have both come to the conclusion that is the best part of life.

We are at a challenging time in our Nation's history. Over the last several days more than 200 people have been killed or wounded in Baghdad. The number of unemployed Americans has been at or near levels not seen in years, poverty is on the rise in our country, and the current administration seems intent on saddling our children and grandchildren with trillions in deficits and debt. For the first time in a dozen years, charitable giving in this country is down. That is not the type of compassion we heard about just 3 short years ago.

While negative indicators are spiking, the Republican leadership of the Congress now is choosing to abandon work on very real problems in education, health care and national security to turn the Senate's attention to wheel-spinning exercises involving the most controversial judicial nominees.

Ironically, in spite of the heated rhetoric on the other side of the aisle, we have made progress on judicial vacancies when and where the administration has been willing to work with the Senate. Indeed, just the other day the Senate confirmed the 167th of this President's judicial nominees—100 of them, confirmed by the previous Democratic-controlled Senate.

In less than 3 years' time, the number of President George W. Bush's judicial nominees confirmed by the Senate

has exceeded the number of judicial nominees confirmed for President Reagan in all 4 years of his first term in office. Republicans acknowledge Ronald Reagan as the ''all time champ'' at appointing Federal judges, and already the record compiled by the Senate in confirming President George W. Bush's nominees compares very favorably to his. Since July 2001, despite the fact that the Senate majority has shifted twice, a total of 167 judicial nominations have been confirmed, including 29 circuit court appointments. One hundred judges were confirmed in the 17 months of the Democratic Senate majority, and now 67 more have been confirmed during the comparative time of the Republican majority.

One would think that the White House and the Republicans in the Senate would be heralding this landmark. One would think they would be congratulating the Senate for putting more lifetime appointed judges on the Federal bench than President Reagan did in his entire first term and doing it in three-quarters of the time. But Republicans have a different partisan message. The truth is not consistent with their efforts to mislead the American people into thinking that Democrats have obstructed judicial nominations. Only a handful of the most extreme and controversial nominations have been denied consent by the Senate. Until today only three have failed. One-hundred sixty-seven to three. That record is in stark contrast to the more than 60 judicial nominees from President Clinton who were blocked by a Republican-led Senate.

Not only has President Bush been accorded more confirmations than President Reagan was during his entire first term, but the Senate also has voted more confirmations this year than in any of the 6 years that Republicans controlled the Senate when President Clinton was in office. Not once was President Clinton allowed 67 confirmations in a year when Republicans controlled the pace of confirmations. Despite the high numbers of vacancies and availability of highly qualified nominees, Republicans never cooperated with President Clinton to the extent Senate Democrats have. President Bush has appointed more lifetime circuit and district court judges in 10 months this year than President Clinton was allowed in 1995, 1996, 1997, 1998, 1999, or 2000.

Last year, the Democratic majority in the Senate proceeded to confirm 72 of President Bush's judicial nominees and was savagely attacked nonetheless. Likewise, in 1992, the last previous full year in which a Democratic Senate majority considered the nominees of a Republican President, 66 circuit and district court judges were confirmed. Historically, in the last year of an administration, consideration of nominations slows, the ''Thurmond rule'' is invoked, and vacancies are left to the winner of the Presidential election. In 1992, however, Democrats proceeded to confirm 66 of President Bush's judicial nominees even though it was a Presidential election year. By contrast, in 1996, when Republicans controlled the pace for consideration of President Clinton's judicial nominees, only 17 judges were confirmed, and not a single one of them was to a circuit court.

In fact, President Bush has now already appointed more judges in his third year in office than in the third year of the last five Presidential terms, including the most recent term when Republicans controlled the Senate and President Clinton was leading the country to historic economic achievements. That year, in 1999, Republicans allowed only 34 judicial nominees of President Clinton to be confirmed all year, including only 7 circuit court nominees. Those are close to the average totals for the 6 years from 1995 to 2000 when a Republican Senate majority was determining how quickly to consider the judicial nominees of a Democratic President. By contrast, the Senate to this point has confirmed 67 judicial nominees, including 12 circuit court nominees, almost double the totals for 1999.

These facts stand in stark contrast to the false partisan rhetoric by which Republican partisans have sought to demonize the Senate for having blocked seemingly all of this President's judicial nominations. The reality is that the Senate is proceeding at a record pace and achieving record numbers. We have worked hard to balance the need to fill judicial vacancies with the imperative that Federal judges need to be fair.

In so doing, we have reduced the number of judicial vacancies to 39, according to the Republican Web site for the Judiciary Committee. Had we not added more judgeships last year, the vacancies might well stand below 25. More than 95 percent of the Federal judgeships are filled. After inheriting 110 vacancies when the Senate Judiciary Committee reorganized under Democratic control in 2001, I helped move through and confirm 100 of the President's judicial nominees in just 17 months. With the additional 67 confirmations this year, we have reached the lowest number of vacancies in 13 years. There are more Federal judges on the bench today than at any time in American history.

But, despite this record of progress, made possible only through good faith effort by Democrats on behalf of a Republican President's nominees, and in the wake of the years of unfairness shown the nominees of a Democratic President, the Republican leadership has decided to use partisan plays out of its playbook as this year winds down.

Today we discuss the nomination of a candidate for a judgeship whose record already has been thoroughly examined and rejected by the Senate Judiciary Committee. Instead of debating and voting on the appropriations bills remaining to us for this year, including the bill that funds the Justice Department, the State Department, the Commerce Department and the Federal judiciary. The Senate is being asked to devote its time to the nomination of a candidate for a judgeship who has demonstrated that his record as a lower court judge is not deserving of a promotion. Instead of putting partisanship aside and bridging our differences for the sake of accomplishing what we can for the American people, we are asked to participate in a transparently political exercise initiated by a President who claimed to want to be a uniter, not a divider. With respect to his extreme judicial nominations, President George W. Bush is the most divisive President in modern times. Through his extreme judicial nominations, he is dividing the American people and he is dividing the Senate.

The nominee we are being asked by the majority to consider today is Charles W. Pickering, Sr., currently a lifetime appointee on the Federal trial court in Mississippi. Originally nominated in 2001 by President Bush, this nominee's record underwent a thorough examination by the Senate Judiciary Committee and was found lacking. Rejected for this promotion by the committee last year because of his poor record as a judge and the ethical problems raised by his handling of his duties in specific instances, Judge Pickering's nomination was nonetheless sent back to the Senate this year by a President who is the first in our history to reject the judgment of the Judiciary Committee on a judicial nominee. This is the only President who has renominated someone rejected on a vote by the Judiciary Committee for a judicial appointment.

For a while this year this renomination lay dormant while Republicans planned a followup hearing in their effort to reinterpret the facts and the record. Every once in a while we would read a news account reporting that some Republican official or other would insist that the nomination was to resurface. Judge Pickering himself told an audience at a recently delivered speech that several hearings on his nomination were scheduled and cancelled over the last year by the Republicans.

Recently, however, Republicans decided to forego any pretense at proceeding in regular order. They simply placed the name of Judge Pickering on the committee's markup agenda and voted him out by means of their one-vote majority. There was no reason given for suddenly bringing this nomination to the fore again. There are plenty of nominees for the committee to consider whom it has not previously rejected. The committee had been told since January that a new hearing would first be held, but none was.

So the timing has begged the question: Why Judge Pickering, and why now? Why not move ahead to confirm well-qualified candidates, such as

Roger Titus or Gary Sharpe? Why expend the Senate's valuable time rehashing arguments about a controversial nomination that has already been rejected once before?

Some have charged that the timing of this vote has been arranged to coincide with the gubernatorial election next Tuesday in Mississippi. That is because for month, after month, after month—10 months, in fact—this renomination lay dormant, and Republicans seemed reluctant to bring it back to the committee, let alone to the Senate floor, for votes.

Next Tuesday, the people of Mississippi will be voting for their Governor in what newspapers report may be a pretty tight race. So now that this nomination is back, coinciding so neatly with an election in which Haley Barbour, a savvy Republican political operative, is challenging an incumbent Democratic Governor, Ronnie Musgrove, it does make you wonder—especially when Governor Musgrove supports the Pickering nomination. Let us hope that the Senate is not being used for that partisan purpose.

Here we have a nominee defeated by the Judiciary Committee entirely on the merits—a nominee who, as Democratic Senators have shown, has a record that does not merit this promotion, who injects his personal views into judicial opinions, and who has made highly questionable ethical judgments. We also have a record of misleading and unfair arguments made by the nominee's supporters in the Senate in the wake of his first defeat, examples of Republican Senators implying that Democrats opposed the nominee because of his religion or region.

Some believe that the political calculation has been made to ignore the facts, to pin some unflattering characterization on Democratic candidates in Mississippi, and to count on cynicism and misinformation to rule the day. Introduce the red herring that opposition to Judge Pickering's confirmation is tantamount to some kind of insult to the South, and hope nobody sees through that deception.

The poorly named ''Committee for Justice,'' an organization created to make the ugliest and most partisan political arguments in favor of President Bush's nominees, and an organization run by the first President Bush's White House Counsel, Boyden Gray, has already produced television advertisements in support of Judge Pickering, designed to put pressure on Democratic Senators. How long before we see those ads running on Mississippi television stations? And out of whose offices does the ''Committee for Justice'' do its business? None other than the Washington lobbying firm still controlled by and named after the Republican nominee himself, Mr. Haley Barbour. And now, as part of an orchestrated campaign, Republican partisans in the House have also been pressed into service for this misinformation campaign.

Another shameful thing we will hear today is a distortion of the history of the filibuster. Some Republicans would now have the public believe that a filibuster of a nominee is, in their words, ''unprecedented.'' This is another deception. As some of these same Republicans well know, they filibustered the nominations of Judge Paez and Judge Berzon on the floor of the Senate in 1999 and 2000, as they conceded at that time. By way of example, I note that several Republicans currently serving voted against cloture, the motion to close debate, after the Paez nomination had been pending before the Senate for more than four years. I have already noted that even after losing the cloture vote, Republicans led by Senator SESSIONS moved to indefinitely postpone a vote on Judge Paez's nomination, and a number of Republican Senators currently serving voted to continue to block action on the Paez nomination in 2000. Yet some Republican Senators now claim that it is unprecedented to filibuster or deny a circuit court nominee an up or down confirmation vote on the Senate floor.

Their filibuster of Judge Paez's nomination is just one example of Republican filibusters of Democratic nominees. Others include Dr. David Satcher to be Surgeon General in 1998; Dr. Henry Foster to be Surgeon General in 1995; Judge H. Lee Sarokin to the Third Circuit in 1994; Ricki Tigert to the Federal Deposit Insurance Corporation in 1994; Derek Shearer to be an Ambassador in 1994; Sam Brown to an ambassador-level position in 1994; Rosemary Barkett, a Mexican-American attorney, nominated to the 11th Circuit, 1994; Larry Lawrence, to be ambassador in 1994; Janet Napolitano at the Justice Department in 1993; and Walter Dellinger to be Assistant Attorney General for the Office of Legal Counsel at the Justice Department in 1993.

The nominations of Dr. Foster and Mr. Brown were successfully filibustered on the Senate floor by Republicans. Similarly, the nomination of Abe Fortas by President Lyndon B. Johnson to the Supreme Court of the United States was successfully filibustered by Republicans with help from some Southern Democrats.

In addition, to the nominees of Democratic Presidents whose nominations were subject to sometimes fatal delay on the floor, Republicans made an art form of killing nominations in committee so that they would never even have a vote on the floor. According to the public record, more than 60 of President Clinton's judicial nominees were defeated by willful refusal to allow them a vote, and more than 200 executive branch nominees, including several Latinos, of President Clinton met the same fate, with their nominations nixed in the dark of night without any accountability. They were filibustered and never allowed votes on the Senate floor. I discussed this history in more detail on February 26, 2003, in the CONGRESSIONAL RECORD.

In addition, in the CONGRESSIONAL RECORD on March 5, 2003, March 11, 2003, and March 13, 2003, I summarized the history of filibusters of nominees. I also spoke on May 19, 2003, about the history of Senate debate and the constitutionality of Rule XXII of the Senate rules. The fact of the matter is that many nominees have been blocked from receiving votes throughout the Senate's history. For example, 25 Supreme Court nominees were not confirmed in the Senate's history. Eleven of those nominations were defeated by delay, not by confirmation votes on the Senate floor, including the nomination of Justice Fortas. Since the early 19th century, nominees for the highest court and to the lowest short-term posts have been defeated by delay, while others were voted down. Not even all of President Washington's nominees were confirmed, nor were many other Presidents', often for political or ideological reasons. Filibusters and other parliamentary practices to delay matters were known to the Framers. There was even a filibuster in the first Congress over locating the capital.

It is too bad that it has come to a filibuster on Judge Pickering's nomination, but the White House's refusal to accept the Senate's advice has made it inevitable.

Let me clearly outline, once again, the reasons why I cannot support this nomination.

Judge Pickering was nominated to a vacancy on the Fifth Circuit on May 25, 2001. Unfortunately, due to the White House's change in the process that had been used by Republican and Democratic Presidents for more than 50 years, his peer review conducted by the ABA's Standing Committee on the Federal Judiciary was not received until late July of that year, just before the August recess. At that point the committee was concentrating on expediting the confirmation hearing of the new Director of the Federal Bureau of Investigation, who was confirmed in record time before the August recess, and other nominations.

As a result of a Republican objection to a Democratic leadership request to retain all judicial nominations pending before the Senate through the August recess, the initial nomination of Judge Pickering was required by Senate Rules to be returned to the President without action. Judge Pickering was renominated in September, 2001.

Although Judge Pickering's nominations was not among the first batch of nominations announced by the White House and received by the Senate, in an effort to accommodate the Republican Leader, I included this nomination at one of our three October hearings for judicial nominations. The day before his hearing, held on October 18, the three Senate office buildings were evacuated because of the threat of anthrax contamination. Rather than cancel the hearing in the wake of the September 11 attacks and the dislocations due to the anthrax letters, we sought to go forward.

Senator SCHUMER chaired the session in a room in the Capitol, but only a few

Senators were available to participate. Security and space constraints prevented all but a handful of people from attending. In preparation for the October 18 hearing, we determined that Judge Pickering had published a comparatively small number of his district court opinions over the years. In order to give the committee time to consider the large number of unpublished opinions that Judge Pickering estimated he had written in his 12 years on the bench, and because of the constraints on public access to the first hearing, the committee afforded the nominee an opportunity for a second hearing.

I continued to work with Senator LOTT and, as I told him in response to his inquiries that December, I proceeded to schedule that follow-up hearing for the first full week of the 2002 session. There was, of course, ample recent precedent for scheduling a follow-up session for a judicial nominee. Among those nominees who participated in two hearings over the last few years were Marsha Berzon, Richard Paez, Margaret Morrow, Arthur Gajarsa, Eric Clay, William Fletcher, Ann Aiken and Susan Mollway, among others. Unlike those hearings, some of which were held years after the initial hearings, Judge Pickering's second hearing was held less than 4 months after the first one and, as promised, during the first full week of the following session.

I should note that the committee worked with Senators LOTT and COCHRAN from the time of the change in the majority to ensure swift confirmation of other consensus candidates to the Federal bench, and as United States Attorneys and United States Marshals. On October 11, 2001, the Senate confirmed United States District Court Judge Michael Mills for the Northern District of Mississippi; on October 23, James Greenlee was confirmed as the U.S. Attorney for the Northern District of Mississippi; and on November 6, Dunn Lampton received Senate approval to be the U.S. Attorney for the Southern District of Mississippi; Nehemiah Flowers was confirmed as the U.S. Marshal for the Southern District of Mississippi on February 8 although he was not nominated until the week before adjournment last session; and Larry Wagster was confirmed as the U.S. Marshal for the Northern District of Mississippi on February 8 although he was not nominated until the day before adjournment the session before. We moved forward quickly that year to fill all these crucial law enforcement vacancies in Mississippi.

After determining that the number of Judge Pickering's published opinions was unusually low, and within a week of the first hearing, the committee made a formal request to Judge Pickering for his unpublished opinions. Judge Pickering produced copies of those opinions to us. They came to the committee in sets of 100 or more at a time, including a delivery of more than 200 the day before Judge Pickering's second hearing, and another 200 or more nearly a week after. It took three written requests from the committee and more than 3 months, but eventually we were assured that all available computer databases and paper archives for all existing unpublished opinions had been searched.

We appreciated Judge Pickering and his clerks providing the requested materials. Other nominees had been asked by this committee to fulfill far more burdensome requests than producing copies of their own judicial opinions. For example, 4 years after he was nominated to the Ninth Circuit, Judge Richard Paez was asked to produce a list of every one of his downward departures from the Federal Sentencing Guidelines during his time on the Federal district court. That request required three people to travel to California and join the judge's staff to hand-search his archives. Margaret Morrow, who was nominated to a district court judgeship, was asked to disclose her votes on California referenda over a number of years and required to collect old bar magazine columns from years before. Marsha Berzon, who was nominated to the Ninth Circuit, was asked to produce her attendance record from the ACLU of Northern California. She was also asked to produce records of the board meetings and minutes of those meeting so that Senators could determine how she had voted on particular issues. Timothy Dyk, nominated to the Federal circuit, was asked for detailed billing records from a pro bono case that was handled by an associate he supervised at his law firm.

The Judiciary Committee only asked Judge Pickering to produce a record of his judicial rulings. They are public documents but were not readily available to the public or the committee. Given the controversial nature of this nomination and the disproportionately high number of unpublished opinions, this request was appropriate as part of our efforts to provide a full and fair record on which to evaluate this nomination, as some Republican Senators have conceded.

I set forth this background, for the record, to ensure that no one misunderstands how the committee went about evaluating Judge Pickering's record. We did not engage in a game of tit-for-tat for past Republican practices, nor did we delay proceeding on this nomination, as so many nominations were delayed in recent years. Rather, the Senate Judiciary Committee seriously considered the nomination, gave the nominee two opportunities to be heard, and promptly scheduled a Committee vote. I also postponed a business meeting of the committee 1 week at the request of the Republican leader, out of deference and courtesy to him.

The responsibility to advise and consent on the President's nominees is one that I take seriously. I firmly believe that Judge Pickering's nomination to the Court of Appeals was given a fair hearing and a fair process before the Judiciary Committee. Those members who had concerns about the nomination raised them and gave the nominee the opportunity to respond, both at his hearing and in written follow-up questions. In particular, I thank Senator SCHUMER for chairing the October 18 hearing and for his fairness then and, again, at the February follow-up hearing. I commend Senator FEINSTEIN for her fairness in chairing that follow-up hearing. I said at the time that I could not remember anyone being more fair than she was that day, and I reiterate that today.

My regret is that she and so many Democrats on the Judiciary Committee were subjected to unfair criticism and attacks on their character and judgment after last year's committee vote defeating the nomination. I was distressed to hear that Senator FEINSTEIN received calls and criticism, as have I, that were based on our religious affiliations. That was wrong. I was disappointed to see Senator EDWARDS subjected to criticism and insults and name-calling for asking questions. That was regrettable. While Democrats and most Republicans have kept to the merits of this nomination, it is most unfortunate that others chose to vilify, castigate, unfairly characterize and condemn without basis some Senators who were working conscientiously to fulfill their constitutional responsibilities.

I would like to explain exactly what it is about Judge Pickering's record as a judge that so clearly argues against his confirmation. My first area of concern, which I raised at his hearing, is that Judge Pickering's record on the United States District Court bench, as reflected by several troubling reversals, does not commend him for elevation. Instead, it indicates a pattern of not knowing or choosing not to follow the law, of relying to his detriment on magistrates and of misstating and missing the law.

At his hearing, I asked Judge Pickering about many of these reversals. Looking at his record, I saw that he had been reversed by the Fifth Circuit at least 25 times. And in 15 of those cases, the Fifth Circuit reversed him without publishing their decisions, which according to their rules and practice indicates that the appellate court regards its decision as based on well-settled principles of law. Those Fifth Circuit reversals on well-settled issues indicated that Judge Pickering had committed mistakes as a judge in either not knowing the law or in not applying the law in the cases before him. That is fundamental to judging.

I asked Judge Pickering about a toxic tort case, Abram v. Reichhold Chemicals. There he dismissed with prejudice the claims of eight plaintiffs because he held that they had not complied with a case management order. That means he dismissed them and denied them all rights to bring the case. Again, the Fifth Circuit reversed Judge Pickering's dismissal, holding he had

abused his discretion because he had not tried to use lesser sanctions before throwing the plaintiffs out of court permanently, without hearing the case on the merits. Again, the Fifth Circuit did not publish its reversal, indicating that it was settled law that a dismissal with prejudice was appropriate only where the failure to comply was the result of purposeful delay or contumaciousness, and the record reflects that the district court employed lesser sanctions before dismissing that action. The Fifth Circuit found none of those conditions existed.

Approximately 3 years before reversing Judge Pickering in the Abram case, it had reversed him on the same legal principle in a case called Heptinstall v. Blount. There the Fifth Circuit held that he had abused his discretion in dismissing a case with prejudice for a discovery violation without any indication that he had used this extreme measure as a remedy of last resort. And in its ruling in Heptinstall, the Court cited another of its previous rulings which stated the same principle of law. Thus, this was not a principle with which Judge Pickering was unfamiliar, he had been reversed on that basis once and committed the same error again. This was binding Fifth Circuit authority of which he was aware but chose not to follow.

At his hearing, I asked Judge Pickering to explain his ruling in Abram, especially in light of the prior reversal by the Fifth Circuit on the same principle of law in another of his earlier cases. And while he offered his recollection of the facts of the case, he offered no satisfactory explanation of why he ruled in a way contrary to settled and binding precedent.

I asked Judge Pickering about a first amendment case, Rayfield Johnson v. Forrest County Sheriff's Department. This was a case in which a prison inmate filed a civil rights lawsuit claiming that a jail's rules preventing inmates from receiving magazines by mail violated his first amendment rights. In an unpublished one-paragraph judgment, Judge Pickering adopted the recommendation of a magistrate and granted the jail officials' motion to grant them summary judgment. In other words, he said that the petitioner's claim of a first amendment right to religious materials which he wanted to get through the mail would be denied without further proceedings.

In its unpublished opinion, the Fifth Circuit Court of Appeals, not considered by many a liberal circuit or one that coddles prisoners, reversed Judge Pickering and said that the inmate's first amendment rights had been violated. In explaining why he was wrong, the Fifth Circuit relied on and cited a published decision of its own from several years before, Mann v. Smith. In that case, they struck down a jail rule prohibiting detainees from receiving newspapers and magazines, holding that it violated the first amendment.

What was of concern here was that in the Mann case, the prison officials had made much the same argument about fire hazards and clogged plumbing that were made by prison officials and accepted by Judge Pickering in the Johnson case. This was a case with almost identical facts in his own circuit, what we call in the law a case ''on all fours'' with the Johnson case, and he did not cite it. Indeed, he turned his back on it and ruled the other way. We do not know whether he did not know the law or did not follow it. At the hearing, Judge Pickering admitted that the magistrate who had worked on the matter and he had ''goofed'' and that he was unaware of the law and the recent, binding precedent in his own circuit.

There are many other reversals, which continue to concern me for the same reasons that I remain concerned about the Johnson case and about the Abram case.

One of them is a case called Arthur Loper v. United States. This is another case in which Judge Pickering was reversed in an unpublished Fifth Circuit opinion, which again means that he violated ''well-settled principles of law.'' This case dealt with an enhanced sentence that the Fifth Circuit found he had imposed improperly on a criminal defendant. When the defendant made a motion for the sentence to be corrected or set aside, Judge Pickering denied the inmate's motion without giving him a hearing but without even waiting for the government to respond. On appeal, the Fifth Circuit reversed Judge Pickering's denial of the motion, noting that the government conceded that the defendant was correct, and that an error had been made that prohibited the judge from imposing the sentence that he did. The Fifth Circuit also cited the statute under which the inmate filed his motion, which requires that under ordinary circumstances, the trial judge ''shall . . . grant a prompt hearing'' and ''make findings of fact and conclusions of law'' on the petitioner's claims. The Fifth Circuit criticized Judge Pickering for denying the motion in a ''one-page order that did not contain his reasoning.'' And then the court went on to remind him that ''[a] statement of the court's findings of fact and conclusions of law is normally 'indispensable to appellate review.''' Reading this case, I can only wonder why Judge Pickering did not abide by the statute and follow the law. Was he unaware of the requirements of the law or had he decided to follow his own view of what the law should be on the matter?

There is another case in which Judge Pickering denied a petitioner's motion for a hearing and missed controlling Fifth Circuit precedent. The case was U.S. v. Marlon Johnson, in which a prisoner claimed that his rights had been violated because of ineffective assistance of counsel and asked that his guilty plea be set aside. The inmate claimed that he had asked his counsel to file a direct appeal of his conviction.

Once again, in another unpublished opinion, the Fifth Circuit reversed Judge Pickering's denial of the inmate's motion, explaining that the inmate's ''allegation that he asked his counsel to file a direct appeal triggered an obligation to hold an evidentiary hearing.'' This time the court of appeals relied on two of its own published decisions for its conclusion, neither of which Judge Pickering mentioned in his ruling. Again, there was settled law in the circuit of which Judge Pickering was unaware of that he chose not to follow.

I know that something will likely be made of statistics purporting to show that Judge Pickering does not have an unusually high ''reversal rate,'' and that other judges, some appointed by Democrats, have higher numbers of unpublished reversals. Whatever these numbers purport to represent about the quantity of Judge Pickering's reversals—and I cannot vouch for them one way or another, not knowing their source or meaning—they do not in any way excuse the poor quality of his underlying opinions.

In addition to the many times that Judge Pickering has been reversed by the Court of Appeals for not knowing or following the law, there are numerous instances of Judge Pickering misstating the law in cases that were not appealed to a higher court and other cases in which he stated a conclusion without any legal support.

An example is a statement by Judge Pickering in a case called Barnes v. Mississippi Department of Corrections. In an earlier go-round in this case, the Fifth Circuit had reversed Judge Pickering on one point, and in this later opinion, he tried to explain that they did so, in part, on the basis of a 1993 Supreme Court case called Withrow v. Williams. In particular, Judge Pickering wrote that the Supreme Court, ''acknowledg[ed] in Withrow that the Miranda warning is not a constitutional mandate.'' This was clearly a misreading of Withrow. I trust that Judge Pickering would now acknowledge that the Supreme Court recently made clear in Dickerson v. United States that the Miranda warning is indeed derived from a constitutional mandate.

An example of an entirely unsupported conclusion comes in a case called Holtzclaw v. United States, where Judge Pickering presided over a habeas corpus petition by a Federal petitioner whom he had convicted. Although this was the first habeas petition the prisoner had filed, Pickering termed the petition frivolous. He regarded the petition as restating claims that had already been made at trial. He dismissed it, and stated that he would order prison officials to punish the petitioner if he filed another frivolous petition. Judge Pickering also conducted a ''survey'' of cases within his district to determine how many frivolous habeas petitions had been filed. However, in the section of his opinion dealing with the sanctions, he did not cite a single statute, rule of procedure, local

rule or case as support for his decision. He stated:

> In the future, this Court will give serious consideration to requiring prison authorities to restrict rights and privileges of prison inmates who file frivolous petitions before this Court. Specifically, this Court gives notice to Roger Franklin Holtzclaw that should he file another frivolous petition for habeas corpus in the future, that the Court will seriously consider and very likely order the appropriate prison officials to restrict and limit the privileges and rights of Petitioner for a period of from three to six months and/or that the Court will also consider other appropriate sanctions. Petitioner Roger Franklin Holtzclaw is instructed not to file further frivolous petitions.

Judge Pickering relied on no authority when he threatened to impose sanctions. This sort of action by a federal judge is disturbing. Through consideration and passage of habeas corpus reforms in 1996, Congress has made very deliberate decisions about what sanctions ought to be imposed for frivolous and repetitious petitions. In Holtzclaw, Judge Pickering went beyond Congress' intent, and in what could be described as judicial activism, threatens sanctions not contemplated by the statute.

Another example of Judge Pickering's misunderstanding the basics of Federal practice and due process occurred in a case called Rudd v. Jones, where he presided over a prisoner's civil rights claim before the enactment of the Prisoner Litigation Reform Act. He properly noted that the Supreme Court required that a pro se plaintiff is ''entitled to have his complaint liberally construed'' and admitted that, under this rule, the complaint ''could be construed to state a cause of action.'' Nevertheless, he claimed that the complaint was stated in only conclusory terms and decided that, ''based upon previous experience with complaints that are couched in such a highly conclusory fashion, this Court is aware that plaintiffs in such cases are very rarely successful and very seldom come forward with any facts that would even justify a trial.'' Therefore, on his own motion, the Judge ordered the plaintiff to refile the complaint with more specific allegations or have the case dismissed before defendant had to respond. He also did another ''survey'' to prove that Federal courts were wasting their resources on frivolous prisoner civil rights claims.

In forcing the plaintiff to refile, Judge Pickering entirely disregarded Federal Rule of Civil Procedure 8, which requires only notice pleading. This is a basic tenet of the American system of jurisprudence, laid out by the Supreme Court in 1957 in Conley v. Gibson.

In yet another case, Judge Pickering disregards the applicable law. In United States v. Maccachran, he denied a habeas corpus petitioner's motion for recusal without referring the matter to another judge. The petitioner filed affidavits stating that the judge had a personal bias against him. The relevant statute, 28 U.S.C. §144, states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

According to the statute, the Judge had to allow another judge decide whether he should be recused or not. However, Judge Pickering did not follow the law, and he decided the case himself, stating that the affidavit was false. In support of his decision, he cited the dissent in a Fifth Circuit case.

I am also concerned about Judge Pickering's rulings and the attitude they signal on one of the most precious rights we have as Americans: voting rights. In Fairly v. Forrest County, a 1993 case, Judge Pickering rejected a ''one-person, one-vote'' challenge to voting districts that deviated in population by more than the amount deemed presumptively unconstitutional by the Supreme Court. He called the doctrine of one-person, one-vote ''obtrusive,'' expressing skepticism about the role of the Federal courts in vindicating rights under the Voting Rights Act in order to ensure meaningful participation by all citizens in elections. In that case he also denigrates the value of each citizen's vote, arguing that the impact of any malapportionment ''is almost infinitesimal'' because an individual voter holds so little power. While we have always known about the power and value of individual votes, the last Presidential election has certainly taught all of us a new respect for the impact of each citizen. Judge Pickering's disregard for such a vital American right and for the worth of each American's vote is extremely troubling.

Additional questions arise from another disturbing trend that emerges from a review of Judge Pickering's opinions, published and unpublished: his habit of inserting his personal views into written decisions in such a way as to create a terrible impression of bias to categories of plaintiffs and hostility to entire types of claims before the Federal courts.

One entire category of claims in which Judge Pickering demonstrates hostility and bias is employment discrimination actions. This is also a category of cases where an examination of the judge's unpublished opinions was crucial, because over the last 12 years on the Federal bench, he chose to publish only one of his employment discrimination decisions. The remaining 12 were all among the unpublished decisions he produced to the committee upon request after his first hearing last October.

What is significant in these cases are the times in the unpublished opinions that Judge Pickering went beyond merely ruling against the plaintiff to make unnecessary, off-the-cuff statements about all the reasons he believes plaintiffs claiming employment discrimination should not be in court, and about the general lack of substance of claims brought under the federal anti-discrimination statutes.

For example, in a 1996 case, Johnson v. Southern Mississippi Home Health, Judge Pickering did not limit his opinion to a legal conclusion based on the facts presented. Instead he made sure to note that:

> The fact that a black employee is terminated does not automatically indicate discrimination. The Civil Rights Act was not passed to guarantee job security to employees who do not do their job adequately.

In a case called *Seeley v. Hattiesburg*, No. 2:96–CV–327PG, (S.D. Miss. Feb. 17, 1998), where he should have limited himself to the facts and the law, Judge Pickering went on to comment about other matters relating to race discrimination lawsuits apparently on his mind at the time, writing that:

> [T]he Courts are not super personnel managers charged with second guessing every employment decision made regarding minorities. . . The federal courts must never become safe havens for employees who are in a class protected from discrimination, but who in fact are employees who are derelict in their duties.

In a credit discrimination case, Judge Pickering ruled on the case before him, and then included a lengthy lecture giving his very personal views on anti-discrimination laws. He wrote:

> This case demonstrates one of the side effects resulting from anti-discrimination laws and racial polarization. When an adverse action is taken affecting one covered by such laws, there is a tendency on the part of the person affected to spontaneously react that discrimination caused the action. Sometimes this is true and sometimes it is not true. All of us have difficulty accepting the fact that we sometimes create our own problems. When expectations are created that are incapable of fulfillment. . . Plaintiffs fail to recognize that whatever your race—black, white, or other—natural consequences flow from one's actions. The fact that one happens to be protected from discrimination does not give one insulation from one's own actions.

All of this unnecessary editorializing is ironic given Judge Pickering's testimony at his first hearing in October of last year, when he explained to the committee why he has chosen to publish so few of his opinions over the years. He explained that, ''Americans were drowning in information,'' and that there is, ''absolutely too much,'' law written down. He testified that his view is, ''[i]f you are not establishing precedent, why make lawyers have to read,'' and that, ''there is too much being written out there.'' ''If you don't have anything to add . . . that is going to be helpful to somebody,'' he said, ''you are just cluttering up the information.''

After reading statements like those I have just read, it seems to me that a plaintiff with a discrimination claim, reading or knowing about Judge Pickering's hostile position toward anti-discrimination laws and claimants, would be justified in fearing that

the judge had already made up his mind.

Such blatant editorial comments, reflecting such a narrow view of the important goals of our Nation's civil rights law, and coming from the pen of the one person who is supposed to guarantee a fair hearing and a just result, are troubling. Judges are not appointed to inject their own personal beliefs into a case.

Judge Pickering voiced another disturbing aspect of his views on employment discrimination cases almost as an afterthought at his second hearing. In an attempt to explain his statements on the weakness of many of these cases in response to Senator KENNEDY, Judge Pickering demonstrated a troubling misunderstanding of the role of Equal Employment Opportunity Commission in reviewing employment cases. He stated that he believed that, ''the EEOC engages in mediation and it is my impression that most of the good cases are handled through mediation and they are resolved. The cases that come to court are generally the ones that the EEOC has investigated and found that there is no basis, so then they are filed in court.'' But this is completely wrong. The EEOC has a backlog of almost 35,000 cases. Both parties must agree to mediation. The commission lack resources. Yet Judge Pickering had already prejudged employment discrimination cases filed in court as without merit. That kind of erroneous and unfair a generalization about the strength of discrimination cases by a Federal judge responsible for presiding over them, was extremely disconcerting. That a Federal judge, on the bench for a dozen years, could so misunderstand the legal and practical mechanisms behind employment discrimination cases was disturbing.

While fair treatment in employment on the basis of race, sex, national origin, age and disability is fundamental to the American dream, and crucial to a free and thriving economy, due process in criminal proceedings can be a matter of life and death. Here, too, Judge Pickering has misunderstood the law and injected his personal views.

In a 1995 case, Barnes v. Mississippi Department of Corrections, Judge Pickering presided over a habeas corpus case in which a prisoner claimed that his confession was involuntary because he had been held in custody for more than three days before being given an initial hearing by a magistrate. The judge denied the petition and the Fifth Circuit reversed his decision. After remand, he again denied the petition, stating that granting such a habeas petition ''is far more cruel than denying to a known murderer a procedural right regardless of how important that right is.'' He cited the Bible and Coke's treatise to make the point that habeas corpus should be limited to petitioners who can prove actual innocence. That was a misstatement of the law in contradiction to Supreme Court precedent. He further stated that, ''[i]t is the fundamental responsibility of government to protect the weak from the strong, but it is also a fundamental responsibility of government to protect the meek from the mean—the law-abiding from the law violating.'' He cited no legal precedent for this apparently personal view that society's natural law rights to be free from crime override the specific protections contained in the Bill of Rights.

In Drennan v. Hargett, a 1994 case over which Judge Pickering presided, a habeas corpus petitioner claimed that he had been denied access to the courts and received ineffective assistance of counsel. He had pleaded guilty to a charge of capital murder at age 15 and received a life sentence. He claimed that his attorney had threatened him with the gas chamber if he did not plead guilty and that his lawyer did not make important motions, such as a motion to suppress his confession under Miranda. He also claimed that he did not know how to obtain relief from the courts for several years because of his youth and because his representatives misled him. Judge Pickering denied the claim, and devoted a third of his opinion, three pages of a nine-page opinion, to arguing that habeas corpus should not be allowed unless a petitioner can prove actual innocence. In this unusual opinion, he cited the ninth and tenth amendments, the Preamble to the Constitution and the Declaration of Independence in support of his views, adding that he believes the Bill of Rights is in tension with the preamble on this point. Again, he cited no legal precedent for these odd and extremely personal views, almost entirely unrelated to the controlling law.

And in Washington v. Hargett, a 1995 habeas corpus case, Judge Pickering rejected the plaintiff's request for DNA testing required to prove his actual innocence, but stated that an attempt to prove actual innocence was, ''the only reason why this Court or any other federal court should be considering a petition for habeas corpus,'' so long after the trial. While that may be Judge Pickering's personal opinion, it is undeniably contrary to Supreme Court and statutory law. They state that a prisoner petitioning for a writ of habeas corpus is contesting the legality of his detention. The Supreme Court explained as much two years before Judge Pickering decided this case.

Interestingly, whatever the answer to that question, in the same case where Judge Pickering declared the importance of actual innocence, he denied a petitioner the only thing that could have possibly proved his—a DNA test. It was in that case of Washington v. Hargett that Judge Pickering summarily rejected the plaintiff's motion for a DNA test in order to prove his claim of innocence. The case involved a rape that occurred in August 1982, before DNA was generally available and accepted in the courts. Yet the judge suggested in his opinion that DNA testing was inappropriate simply because the request came in 1995—13 years after the trial. As he put it:

> Plaintiff had a fair criminal trial. He was, and is, entitled to nothing more. He was not entitled to a perfect trial. No such trial can be held. Plaintiff states that he wants DNA testing now thirteen years later. He wants a new trial. A new trial, now, 13 years later, would be much less reliable than the one that occurred 13 years ago.

As Judge Pickering may well know, over the last decade, post-conviction DNA testing has exonerated well more than 100 people, including 11 who were awaiting execution.

I have introduced legislation that would, among other things, afford greater access to DNA testing by convicted offenders. Senator HATCH and Senator FEINSTEIN have also introduced bills to promote the use of DNA testing in the post-conviction context. In recent weeks I joined with Chairman HATCH and others in introducing a bill drawn from these earlier efforts. Attorney General Ashcroft has stated that ''DNA can operate as a kind of truth machine, ensuring justice by identifying the guilty and clearing the innocent.'' Judge Pickering appears in this case to have created an exception to his own oft-expressed view that habeas corpus should be considered would be to establish actual innocence.

I have asked in a number of different cases and areas of the law whether Judge Pickering was unaware of the law in different areas or whether he was trying to impose his own views in spite of the law. Another area of great concern to me—Judge Pickering's intervention on behalf of a convicted criminal—raises this same fundamental question.

In this 1994 case, United States v. Swan, Judge Pickering presided over a case brought against three people accused of burning a cross on the lawn of an interracial couple. Two of the defendants, one a juvenile and the other with significant mental disabilities, accepted plea bargains offered by the prosecution. The third, Daniel Swan, the only competent adult of the three, was also offered a plea up to the last minute, but chose to go to trial, and was convicted of all three counts brought by the Government. The story of what happened next is what troubles me about Judge Pickering.

But before I get to that, I think it is important for us to understand exactly what the facts were in the case. From the trial transcript we know that on a night in early January of 1994, three young men hanging out and drinking in front of a convenience store got the idea to go and burn a cross on the lawn of a local family where the husband, Earnest Polkey, was a white man, and his wife, Brenda, was African American. Testimony at trial shows that two of the defendants, Jason Branch, who was at the time a juvenile, and Daniel Swan, a competent adult, were the moving forces behind this idea. The third man, Mickey Thomas, had a very low IQ and mental difficulties. It really

was Branch and Swan who referred to the Polkey family using awful racial slurs, and together they cooked up this idea.

After deciding what they would do, they moved into action, and using Daniel Swan's pickup truck, his wood, his nails, his gasoline and his lighter, the three men constructed a cross, took it to the Polkey's front lawn, leaned it up against a tree, and lit it on fire.

Not long afterward, the three were caught by the FBI and all three were charged with the identical counts: 18 U.S.C. 241, conspiracy to deprive victims of their civil rights, 18 U.S.C. 3631(a), intimidation on account of race, and 18 U.S.C. 844(h)(1), the use of fire in the commission of a felony. All three were also offered a plea bargain which would result in little or no jail time, and two of them took the offer. Two of them, Jason Branch, the minor, and Mickey Thomas, who has a mental disability, took the deal. They decided not to roll the dice with a jury, and to admit their responsibility for the crime. These kinds of deals happen every day. They permit the justice system to function, and they offer defendants opportunities to admit their guilt.

One of the defendants, Daniel Swan, didn't take the offer. Instead, Mr. Swan, who had boasted to friends before he was caught that he would never do any time even if he was caught, decided to take his chances in front of a jury. Well, it was not a wise decision for Mr. Swan, because once the jury heard the evidence that I recounted earlier, they convicted him on all counts. And that is where Judge Pickering's unethical behavior comes in.

Instead of doing what the law required of him and sentencing Daniel Swan to at least the congressionally required mandatory minimum sentence of 5 years for his conviction of the use of arson in a felony, he started to act like one of Daniel Swan's defense attorneys and to advocate for him, insisting that the Justice Department drop the arson charge so Swan could get a more lenient sentence.

Why would the Government drop a charge after having secured a conviction in such a terrible hate crime? Why would the prosecution agree to imposition of such a reduced sentence for someone already found guilty by a jury of his peers? According to documents that the Department of Justice produced to the committee only minutes before Judge Pickering's second hearing was to begin, and documents that they agreed to make public in a heavily redacted form a week after that, Judge Pickering made them an offer that they could not refuse. He threatened them. He threatened them with bad law—with a decision that would have called into question the applicability of the arson charge to cross burnings. And he threatened to make—and presumably grant his own motion for a new trial for Mr. Swan—a motion for which there would have been no basis in law.

He badgered them, ordering them in extraordinary terms to consult personally with the Attorney General, to report on all prior Justice Department prosecutions for cross burnings, and to agree to dismiss an already secured conviction, in the face of the fact that the law did not permit the result he sought. And when the prosecutors, career assistants in the United States Attorneys Office and career prosecutors in Washington, refused to cave in to his bullying, Judge Pickering took things a step further, and he called an old friend, then in a high-ranking position at the Department of Justice. As he admitted in a letter to me and in testimony at his second hearing, Judge Pickering, unhappy with the answer he was receiving from those prosecuting the case, called the Assistant Attorney General for the Civil Division, a friend of long standing from Mississippi, to, as he explained it, express his frustration with the prosecutors. Judge Pickering insisted in his testimony to the committee that he did not ask his old friend to do anything or take any action but he did not deny the contact.

This sort of contact with the Department of Justice during a pending case is extremely troubling. These sorts of ex parte contacts are expressly prohibited by every code of conduct and canon of ethics ever written, and for good reason. The credibility of our entire system of justice rests on the presumption that the conduct of every trial, criminal or civil, is fair and above board, and that no one side has any real or perceived advantage. Judge Pickering's phone call and actions undermine that assumption in very disturbing ways.

Judge Pickering and his defenders in this matter will tell you that he intervened in this case not because he took pity on Daniel Swan, a convicted hate criminal, but because he was concerned about the disparity among the sentences handed down to the three offenders. He blamed the Government for agreeing to lower sentences for the two parties who pleaded guilty and then ''recommending,'' as he inaccurately puts it, a higher sentence for the party who took his chances with a trial. He tried to give the impression that upon the sentencing for Mr. Swan he was surprised to learn about certain aspects of the crime and the defendants' behavior in them. But it is clear, upon examining the record, that none of the defendants was sentenced until after Mr. Swan's trial, until after all the testimony about their actions and relative culpability had been revealed in sworn public testimony. Judge Pickering is the one who sentenced all these defendants after having presided over the case.

Moreover, I know of no other criminal cases in which Judge Pickering intervened based on a concern about disparate sentencing or another case in which he took action to avoid imposing a sentence based on a statutory mandated minimum. His defenders will point to a few cases where he properly showed leniency within the law, but they are different from this one. In those cases it is clear he had the legal discretion to reduce sentences, but those advocating this nomination can point to no specific legal justification here.

The law has very real consequences, as this letter from Mrs. Brenda Polkey makes clear. It was sent to me last year when I was Chairman of the Committee. Mrs. Polkey says:

My now-deceased husband, Ernest Polkey, and I were the victims of a cross-burning at our home in Improve, Mississippi in 1994. We had purchased the home in Southern Mississippi while I was still active military and my husband had retired from the military. The cross-burning case was prosecuted by the Justice Department in Judge Charles Pickering's court.

I write to express my profound disappointment in learning of Judge Pickering's actions toward the defendant, Daniel Swan. As you can imagine, my family suffered horribly as a result of the conduct committed by Mr. Swan and the two other defendants. My daughter actually saw the cross in our yard the morning of the incident. I still have a photograph of the cross that I took that morning to make sure that the crime was documented properly.

The trial of Daniel Swan was extremely emotional for me and my family. As a native Southerner, I had grown up in the 1960's with violent acts based on race, and I lost a member of my family due to a racial killing. I never imagined that violence based on racism would come my way again in the 1990's. We helped in the prosecution of the case, and I testified at the trail. The local NAACP gave me a certificate for my role in pursuing the case.

I experienced incredible feelings of relief and faith in the justice system when the predominantly white Mississippi jury convicted Daniel Swan for all three civil rights crimes. I had hoped against hope that the jury would do the right thing and convict Mr. Swan of this horrible deed. The jury came to a guilty verdict on all three counts after only two hours.

My faith in the justice system was destroyed, however, when I learned about Judge Pickering's efforts to reduce the sentence of Mr. Swan. I cannot begin to explain what his actions have done to my longstanding opinion that we were correct in helping to prosecute the case, in trying to bring about justice and in trying to prevent hate crimes from being committed against other persons. I am astonished that the judge would have gone to such lengths to thwart the judgment of the jury and to reduce the sentence of a person who caused so much harm to me and my family.

I am very much opposed to any effort to promote Judge Pickering to a higher court. Respectfully yours, Mrs. Brenda Polkey.

When I raise questions about this case and Judge Pickering's involvement in the case and suggest it violates every Canon of Judicial Ethics, it is not just my opinion. It is the opinion of some of the Nation's foremost legal scholars on judicial ethics. Let me read to you what some of them have said. Professor Stephen Gillers of the New York University School of Law, one of the foremost, if not the foremost, legal ethics experts in the country, told Senator EDWARDS after Judge Pickering's hearings: ''Judge Pickering exceeded

his powers as the trial judge in the Swan case in a way that undermined decisions of the political branches of government. He then sealed the Order that would have fully revealed his actions.''

The professor concludes that this is a violation of Canon 2A and 3A(1) of the Code of Conduct for U.S. Judges because of his failure to respect and comply with the law or to be faithful to the law. He substituted his judgment not only for the judgment of the prosecutors, but also for the judgment of the legislators, this Senate and the House, instead of sticking to his role as a judge. And by sealing the order that revealed his position, he made certain that no judicial review of his actions could occur.

Professor John Leubsdorf, legal ethics professor and Judge Lacey Distinguished Scholar at Rutgers Law School, agreed with Professor Gillers. Professor Leubsdorf, who has been studying and teaching Legal Ethics for 25 years, has taught at Columbia, Cornell, and the University of California-Berkeley's law schools, and has published articles in the Harvard, Yale, Stanford, Texas, NYU, Pennsylvania, Minnesota, and Cornell law reviews, could not have been clearer. After reviewing the judge's actions, he concludes that, ''[w]hatever Judge Pickering's motives may have been, this was no way for a judge to behave,'' and that he ''cannot escape the conclusion that Judge Pickering departed from his proper judicial role of impartiality in the Swan case to become an advocate for the sentence he considered proper.''

Steven Lubet, a Professor of Law at Northwestern University Law School, director of the law school's Program on Advocacy and Professionalism, and the author of numerous articles on legal ethics, reached much the same conclusion. He tells us that, ''Judge Pickering's actions raise serious questions under the Code of Conduct for United States Judges. In particular, it appears that Judge Pickering initiated a prohibited ex parte communication in violation of Canon 3A(4),'' and that his, ''extended efforts to reduce Swan's sentence for cross burning appear to have compromised his impartiality, taking him nearly into the realm of advocacy, thus implicating Canons 2A and 3A as well.''

The ethics concerns raised by the judge's behavior in the cross burning case are not the only ethical problems Judge Pickering's nomination presents. There is also the very serious matter of his having solicited letters of support and having asked to review them before forwarding them to the Justice Department and to the Senate. As Professor Gillers for NYU explains, this is a matter of grave concern. The letter, which has been made a part of the record, recounts the various Canons of the Code of Conduct for U.S. Judges implicated by this behavior, and is just another reason why I cannot approve of Judge Pickering's elevation.

I should note that Judge Pickering's behavior in this matter is similar to that of a nominee from more than 20 years ago, Charles Winberry. Nominated to the U.S. District Court in North Carolina by Democratic President Jimmy Carter, Mr. Winberry's nomination was defeated in the Judiciary Committee in 1980. Among the grounds on which I opposed this nomination, sent to the Senate by a President of my party, were my objections to Mr. Winberry's having solicited letters from lawyers who would be appearing before him, if he were confirmed, and for asking for blind copies of those letters.

The increasing frequency of nominees campaigning for confirmation to the federal bench is a troubling development and one that threatens the very independence of our judiciary. I was concerned about it in 1980 and I remain concerned about it in 2002.

During the course of these proceedings, some have falsely contended that Democratic Senators have called Judge Pickering a racist. That did not happen and that criticism is a smokescreen to obscure the real problems with this nomination. I attended the committee hearings on this nomination and witnessed Democratic Senators asking questions and the nominee being given opportunity after opportunity to make his best case for elevation to the Fifth Circuit. Some have even insinuated that Senators who oppose this nomination are anti-Southern or anti-Christian, a smear that is as wrong as it is ugly. The talking points distributed by the other side are partisan, political and intentionally misleading. They have been accepted and repeated by some who have failed to review the record. That is unfortunate.

I think the nominee's past views and actions during a difficult time in Mississippi's history were not irrelevant, but I based my decision on his years on the bench and the record amassed and reviewed at our hearings.

So let me sum up for my colleagues what Judge Pickering's own record makes clear. Judge Pickering's record is replete with examples of bad judging and is littered with cases that demonstrate a misunderstanding of the law in many crucial and sensitive areas. Judge Pickering's record shows a judge inserting his personal views into his judicial opinions and putting his personal preferences above the law. It is a record that does not merit this promotion to one of the highest courts in the land. Based on Judge Pickering's record, I will vote against invoking cloture, and should cloture be invoked, I will vote against this nomination.

If Judge Pickering's nomination is not ultimately successful, he will nonetheless remain a Federal judge of the Southern District of Mississippi with life tenure. He will be responsible for presiding over cases and determining matters central to the lives and well-being of many people in Mississippi and from elsewhere. He has served as a prosecutor, a State legislator, a local leader, and now as a Federal judge.

The oath taken by Federal judges is a solemn pledge to administer justice fairly to those who come before the court seeking justice. It extends to those who are rich or poor, white or black, Republican or Democrat, without regard to gender or sexual orientation, national origin or disability.

Judge Pickering remains a very important and powerful person in Mississippi. I understand that he may be the only Federal judge who sits in Hattiesburg. The judge's ability faithfully to discharge the duties of the office are important every day, on every case, with respect to every claim and regarding every litigant. I bear him no malice and wish him and his family well.

Parliamentary inquiry: How much time remains for the distinguished Senator from Utah and myself?

The PRESIDING OFFICER. Each side has 7½ minutes.

Mr. LEAHY. Mr. President, I will yield 3 minutes to the distinguished senior Senator from Massachusetts in just a moment.

I would hope, after this debate, we might start debating judicial nominees based on the facts and not on some of the innuendoes we have heard.

Mr. President, before I yield, I understand that again we are reserving the last 5 minutes for the distinguished senior Senator from Mississippi; is that correct?

The PRESIDING OFFICER. That is correct. You asked for 5 minutes, but you will not have 5 minutes after allotting the 3.

Mr. LEAHY. I understand. I thank the distinguished Presiding Officer, who is, after all, a model of propriety and fairness.

I yield 4 minutes to the Senator from Massachusetts.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I oppose the nomination of Judge Charles Pickering on his record. I want to be absolutely clear about that. Charles Pickering has a disturbing record as a U.S. district court judge that simply does not qualify him for appointment to the Fifth Circuit. He has often been hostile to plaintiffs bringing civil rights claims, he has questioned the value of important constitutional protections such as ''one-person, one-vote,'' and he has tried to restrict habeas corpus. His cases are filled with dicta and with expressions of his own personal opinion. This all calls into question his ability to enforce statutory and constitutional protections and his judicial temperament.

The States of the Fifth Circuit are among the poorest in the Nation. They have a population that is 42 percent minority—the highest of any circuit. For many years, the Fifth Circuit had a critical role in the Nation's history in applying and interpreting the civil rights laws. Not long ago, the circuit was hailed for its courage in protecting

the civil rights of African Americans. When Congress passed the 1964 Civil Rights Act and the 1965 Voting Rights Act, many State and local governments in the South resisted these measures. Federal judges such as Elbert Tuttle, Frank Johnson, and John Minor Wisdom helped to make the promise of equality a reality by enforcing these landmark laws of our time. It is particularly important that a judge appointed to this court have a commitment to civil rights, to the constitutional safeguards that protect all Americans, and to the rule of law.

I am disturbed by the rhetoric I have heard today that those of us who oppose this nomination are a ''lynch mob.'' This rhetoric is a profoundly cynical misuse of race and disregards the lessons that we should all have learned from history. Those who cannot tell the difference between a mob bent on murder and torture of an innocent individual solely because of the color of his skin, on the one hand, and those of us in the Senate who seek to focus on genuine issues in Judge Pickering's record, on the other hand, needs a serious history lesson. Frankly, such a comparison is not only unfair, but it does an injustice to those African Americans who suffered and died at the hands of real lynch mobs in the South, including in the State of Mississippi. This is not a lynch mob, this is reasoned debate, and it is part of our constitutional role of advice and consent to engage in such debate.

Judge Pickering's troubling record on civil rights and his injection of his personal opinion can be seen in his extraordinary intervention on behalf of a cross-burning defendant. Pickering repeatedly pressured the Federal Government to drop a charge against a convicted cross-burner to avoid having the defendant serve a congressionally mandated 5-year minimum sentence. Pickering went so far as to threaten to order a new trial, and to initiate an ex parte communication with a high-ranking official of the Justice Department while the case was pending before him. Three ethics experts have written Senator EDWARDS stating that this conduct violated the Code of Judicial Conduct.

I have spent a great deal of time thinking about this case, and I have come to the conclusion that Judge Pickering's efforts to reduce the defendant's sentence of a convicted cross-burner in United States v. Swan cannot be justified by the fact that other participants in the cross-burning received lesser sentences.

The other two participants in the cross-burning pled guilty and therefore were not subject to mandatory minimum sentences. Mr. Swan was tried and found guilty of a crime that has a mandatory minimum sentence. This eliminated any sentencing discretion Judge Pickering might have had under the law. Thus, this case raises the question of whether Judge Pickering will follow the law even if he does not agree with it.

Mr. Swan was an adult of average intelligence at the time of the crime. By contrast, one of the other participants was severely limited in intelligence, with an IQ of 80, and the other was a juvenile. Thus, Mr. Swan arguably bore greater responsibility for the hate crime. Finally, the materials used to build the cross, the gasoline used to douse it, the truck used to transport it, and the lighter used to ignite it all belonged to Mr. Swan.

The PRESIDING OFFICER. The Senator has used 4 minutes.

Mr. LEAHY. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. Two minutes.

Mr. LEAHY. I yield the 2 minutes to the Senator from Massachusetts.

Mr. KENNEDY. Judge Pickering has a duty to follow the law and the canons of judicial ethics whether or not he agrees with them. His failure to do so in this recent case cast doubt on whether he would do so if confirmed to the Fifth Circuit.

In a letter to Senator HATCH, Judge Pickering admitted that he has departed downward from other mandatory minimum sentences only when the Sentencing Guidelines allowed an exception.

I have heard some say that the fact that some black Mississippians may support Judge Pickering should be enough to have him confirmed. Many black Mississippians, including those from organizations representing thousands of African Americans in Mississippi have come out against Judge Pickering. The State's major African American Bar Association—the Magnolia Bar Association—has written a letter to the Committee opposing Judge Pickering. He is also opposed by Eugene Bryant, President of the Mississippi State Conference of the NAACP, which represents one hundred chapters of the NAACP.

Democrats have not smeared Judge Pickering's reputation by examining his record. Judge Pickering has a complex legacy. On the one hand, he testified against the KKK and has spoken in favor of racial reconciliation. On the other, he has opposed civil rights laws, and the concept of ''one-person, one-vote'' under the Voting Rights Act. Democrats on the Judiciary Committee have never said that he is a racist. But the committee has to determine what sort of judge he will be, not what kind of neighbor he is or the nature of his historical legacy. His 12 years as a district court judge provide us with a clear record that he is unwilling to apply or respect the law when he disagrees with it, and I will vote against his nomination.

Mr. HATCH. Mr. President, how much time do I have?

The PRESIDING OFFICER. The Senator from Utah has 7 minutes 29 seconds, with 5 minutes being reserved for the Senator from Mississippi.

Mr. HATCH. Is that all the time left on either side?

The PRESIDING OFFICER. That is correct.

Mr. HATCH. Mr. President, I have heard my distinguished friends on the other side say we have approved 167 judges but have rejected only 3 with a filibuster. Actually, that is a little bit of an untruth because Miguel Estrada was filibustered and, of course, withdrawn. Priscilla Owen is presently being filibustered. Carolyn Kuhl, there is a threatened filibuster on her. These are all circuit court of appeals nominees. William Pryor has already been filibustered. Charles Pickering is being filibustered. This is a cloture vote to determine whether we can even have the dignity of an up-or-down vote.

Leon Holmes has been threatened with a filibuster. Janice Rogers Brown has been threatened with a filibuster. Claude Allen has been threatened with a filibuster.

The fact is, we have never had a filibuster before in the history of the Senate, in the history of this country, with regard to judicial nominees.

I have heard a lot of comments about what a nice man Judge Pickering is and all of this; it is the record they disagree with. This is a man who has been on the bench for a long time, and he would be a rare person if you didn't find one or two cases with which you disagree. I have to say that in all honesty, most of these arguments they have made are smokescreen issues and arguments.

Mr. LEAHY. Will the Senator yield for a question?

Mr. HATCH. I can't right now because I have a limited time.

Every one of them can be answered. Let me tell the principal reason behind this. After we voted Judge Pickering out of the committee a few weeks ago, we held a press conference. One of the people who appeared with us at the press conference was one of the leading civil rights ministers of the South, former head of the ACLU in Mississippi, really one of the most respected people in the civil rights cause. His life had been threatened. He came and spoke fervently for Judge Pickering. Before he did, I got up and I said: This is all about abortion.

After he spoke, he came up to me and he said: Senator, as you know, I am pro-choice, but you are absolutely right. This is all about abortion. Let me make that case by putting up this chart, the National Abortion Rights Action League.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. HATCH. I ask unanimous consent for 30 seconds for each side.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HATCH. The National Abortion Rights Action League, Pro-choice America sent this out to everybody they could: ''Urge your Senators to stop anti-choice nominee Pickering'' because they know he is pro-life, even though he has agreed he will abide by the law. He will abide by Roe v. Wade.

He will abide by the other abortion cases. That is what this is all about. Frankly, I have it on impeccable information that that is what this is all about.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. I am sorry the Senator from Utah was unwilling to yield for a question. He mentioned a threatened filibuster on Mr. Holmes. I assure him, we have cleared Holmes on our side. The Republicans could bring him up any time they want. There is no filibuster being threatened over here. I don't know why they don't bring him up. Gary Sharpe of New York, I don't know why they don't bring him up. These are judges they could bring up any time they wanted. They have been cleared for a vote on this side. We may vote for or against them. But Mr. Holmes is not being filibustered. That is a mistake on the part of the Senator from Utah.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. COCHRAN. Mr. President, Charles Pickering has been subjected to the most intense and thorough scrutiny that I can remember any judicial nominee enduring since I have been in the U.S. Senate. After all of his opinions as a United States district judge have been read and reread and dissected, this is what the record shows.

In 13 years on the Federal bench, he has demonstrated a sense of fairness and good judgment that has reflected credit on the Federal judiciary. He has become known throughout our State as someone who is above reproach, who is totally honest and honorable, and who applies the law without regard to race, creed, or ethnicity in an intelligent, thoughtful, and sensible manner.

He is widely respected as a United States district judge. I have no doubt that if confirmed by the Senate, he will serve with distinction and dedication on the United States Court of Appeals for the Fifth Circuit.

Before he became a Federal judge, Charles Pickering served ably in the Mississippi State Senate and was the chairman of the Mississippi Republican Party. He was elected county prosecuting attorney after he had been engaged in the practice of law for only 2 years. When Charles Pickering was nominated to serve on the U.S. District Court for the Southern District of Mississippi in 1990, he was approved unanimously by the Senate Judiciary Committee. And he was confirmed unanimously by the U.S. Senate.

As U.S. district court judge, he has become one of the highest rated judges in the Nation. Judge Pickering has received the highest rating from the American Bar Association. He has a lower reversal rate than both the national and Fifth Circuit average. Mr. President, 99.5 percent of his cases have been affirmed or not appealed. Of those cases that have been appealed, Judge Pickering has only a 7.9-percent reversal rate, which is 20-percent lower than the national average of the Department of Justice, and two times lower than the average district court judge in the Fifth Circuit.

He has been endorsed by the current president and the past 17 presidents of the Mississippi State Bar. He is endorsed by all of the major newspapers in Mississippi. He has also been endorsed by all of our State government officials who were elected statewide, including the Democrats who serve as Governor, attorney general, and secretary of state.

The people who know Charles Pickering the best are the residents of my State, and they overwhelmingly support his confirmation as a court of appeals judge.

It is time to end this effort to discredit and demean this good man. It is time for the Senate to do what is right and confirm this well-qualified and honorable nominee.

The PRESIDING OFFICER. Has all time been yielded back?

The majority leader.

Mr. FRIST. Mr. President, on leader time, I wish to make a few closing statements with regard to this vote and this nomination.

In a few minutes, we will have the opportunity to vote on whether Judge Pickering, whom the Senate has once before confirmed to the Federal district court without blemish, can be given the simple fairness, the simple honesty of an up-or-down vote or whether he will be denied that fairness.

The vote matters to many people because none of the President's judicial nominees has suffered more indignities and distortions than this superbly qualified man, Judge Pickering.

Others in the past and over the course of the morning have spoken much more ably about the qualifications with regard to this superbly qualified individual, Judge Charles Pickering.

I know the passion of the two Mississippi Senators from whom we just heard. We heard Senator LOTT speak about this man, and we heard the strong support from Mississippi Senator THAD COCHRAN for this nominee, and we know of the hard work of the chairman of the Judiciary Committee, Chairman HATCH—all of whom have worked so hard to bring this nomination to the floor over the last 2½ years since he was first nominated by President Bush—again, 2½ years ago.

It had always been my hope over the last 10 months since I became majority leader that we would be able to put much of the unfortunate history of the 106th Congress behind us when it came to judicial nominations. By that, I refer to the inaction on nominees in committee to their outright defeat in committee which denied the opportunity for all Senators to exercise the constitutional responsibility of advise and consent, and the ability and opportunity to vote up or down on judicial nominations. I think we have made huge progress over the course of this year in that regard, thanks to Chairman HATCH.

While in many ways we closed that chapter of Senate history, a new chapter has opened and, once again, I believe we will see it today, and that is this unprecedented use of the partisan filibuster in the Senate to deny Senators the opportunity and the ability to have an up-or-down vote to speak clearly, and the way we have the power to do that is through our votes, either for a judicial nomination or against a judicial nomination.

What bothers me as majority leader is what that says about our institution and about the future of this institution. Many of us have spoken to this and have warned over the past several months about the dangers of departing from this 200-year history of the Senate, that tradition of precedent from which all of a sudden we are seeing this departure over the course of this year.

Today, in just a few minutes, once again we have a choice, an opportunity to move ahead and make progress and to discharge that constitutional responsibility of an up-or-down vote. This is not only a vote to decide whether the Senate will say yes or no to a man who, as we all know, is perfectly qualified, a good man, a man of high integrity and character, an able jurist who we all know will bring credit to the Federal appeals court.

To vote yes on cloture, in my view, is the latest referendum on whether or not we want to reaffirm our history in this body, the Senate, whether or not we want to shut this new chapter of unprecedented delay and destruction, whether or not we want to return the Senate to the well-worn path that it has tried over the last 200 years but from which over the course of this year we seem to be deviating, a path of men and women coming to this body and by their vote being able to take direct responsibility of either confirming or rejecting a nomination.

I represent the State of Tennessee. Right now I represent my party as Republican leader. In addition, I, as majority leader, believe I have a responsibility to this entire body. Together we look to the past and we build for the future. I appeal once again to my colleagues to remember the history we have as stewards, as servants to this institution; that we remember the responsibilities charged to us by the Constitution, responsibilities of advise and consent, and vote aye on cloture, and then vote up or down but vote one way or another on the nomination of Charles Pickering. To do any less than that does fail the history we have had the privilege to recognize and be part of. Indeed, it adds one more obstacle to the progress we could make as we go forward.

Finally, it does ensure that with this new course foisted on the Senate, we will have to meet that radical departure from 200 years of history with responses that will reestablish a more regular order of action in the future.

Mr. President, I close by simply saying I urge our colleagues to support an opportunity for an up-or-down vote—that is all we ask—on Judge Charles Pickering.

The PRESIDING OFFICER. All time has expired.

Mr. REID. Will the majority leader yield for a question not related to the Pickering nomination?

Mr. FRIST. Through the Chair, I will be happy to yield.

Mr. REID. Mr. President, we were originally going to have a vote on the global warming issue. It would have been about 12:45 p.m. This will necessitate that vote occurring around 1:15 p.m., but under the regular process here, on Thursdays we do not vote during the hour of 1 p.m. to 2:15 p.m. I wonder if the leader will be able to at this time indicate that the managers of the Healthy Forests issue should be here about 1:15 p.m., or thereabouts, so they can start on that issue prior to voting on the global warming issue, which I hope can occur at 2 o'clock because there are a number of people on our side who need to vote on that. I hope the leader understands what I am saying.

Mr. FRIST. Mr. President, I do. Let me talk to the managers before actually agreeing to anything. I have not talked with them about the scheduling. Before committing to a schedule, let me make an announcement right after this vote.

Mr. LOTT. Mr. President, has all time expired?

The PRESIDING OFFICER. All time has expired.

Mr. LOTT. Mr. President, I ask unanimous consent that the cloture vote be vitiated and that the Senate immediately proceed to a vote to confirm the nomination of Judge Charles Pickering to the Fifth Circuit Court of Appeals.

Mr. REID. I object.

The PRESIDING OFFICER. Objection is heard.

CLOTURE MOTION

The PRESIDING OFFICER. By unanimous consent, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will report.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 400, the nomination of Charles W. Pickering, Sr., of Mississippi, to be United States Circuit Judge for the Fifth Circuit.

Bill Frist, Orrin Hatch, Trent Lott, Conrad Burns, Lamar Alexander, Arlen Specter, Mitch McConnell, Mike DeWine, Chuck Hagel, Rick Santorum, Craig Thomas, Thad Cochran, John Ensign, Lindsey Graham, Elizabeth Dole, Michael B. Enzi, Gordon Smith.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Charles Pickering, Sr., of Mississippi, to be United States Circuit Judge for the Fifth Circuit shall be brought to a close? The yeas and nays are mandatory under the rule. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from North Carolina (Mr. EDWARDS) and the Senator from Massachusetts (Mr. KERRY) are necessarily absent.

I also announce that the Senator from Nebraska (Mr. NELSON) is absent attending a family funeral.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote ''nay.''

I further announce that, if present and voting, the Senator from Nebraska (Mr. NELSON) would vote ''yea.''

The PRESIDING OFFICER (Mr. ENSIGN). Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 54, nays 43, as follows:

[Rollcall Vote No. 419 Ex.]

YEAS—54

Alexander	DeWine	McCain
Allard	Dole	McConnell
Allen	Domenici	Miller
Bennett	Ensign	Murkowski
Bond	Enzi	Nickles
Breaux	Fitzgerald	Roberts
Brownback	Frist	Santorum
Bunning	Graham (SC)	Sessions
Burns	Grassley	Shelby
Campbell	Gregg	Smith
Chafee	Hagel	Snowe
Chambliss	Hatch	Specter
Cochran	Hutchison	Stevens
Coleman	Inhofe	Sununu
Collins	Jeffords	Talent
Cornyn	Kyl	Thomas
Craig	Lott	Voinovich
Crapo	Lugar	Warner

NAYS—43

Akaka	Dorgan	Lieberman
Baucus	Durbin	Lincoln
Bayh	Feingold	Mikulski
Biden	Feinstein	Murray
Bingaman	Graham (FL)	Nelson (FL)
Boxer	Harkin	Pryor
Byrd	Hollings	Reed
Cantwell	Inouye	Reid
Carper	Johnson	Rockefeller
Clinton	Kennedy	Sarbanes
Conrad	Kohl	Schumer
Corzine	Landrieu	Stabenow
Daschle	Lautenberg	Wyden
Dayton	Leahy	
Dodd	Levin	

NOT VOTING—3

Edwards	Kerry	Nelson (NE)

The PRESIDING OFFICER. On this question, the yeas are 54, the nays are 43. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

CLIMATE STEWARDSHIP ACT OF 2003

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 139, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 139) to provide for a program of scientific research on abrupt bankrupt climate change, to accelerate the reduction of greenhouse gas emissions in the United States by establishing a market-driven system of greenhouse gas tradeable allowances that could be used interchangeably with passenger vehicle fuel economy standard credits, to limit greenhouse gas emissions in the United States and reduce dependence upon foreign oil, and ensure benefits to consumers from the trading in such allowances.

Pending:

Lieberman/McCain amendment No. 2028, in the nature of a substitute.

The PRESIDING OFFICER. The assistant Democratic leader.

Mr. REID. Mr. President, we are now on global warming. Because of scheduling problems, the managers of the bill, Senator INHOFE, Senator MCCAIN, and Senator LIEBERMAN, have agreed to each give up 15 minutes on their side. Therefore, the vote will occur at 12:45. I ask unanimous consent that be the case—that the vote occur at 12:45.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Under the previous order, there are 90 minutes equally divided for debate between the chairman and the Senator from Connecticut, or their designees.

Mr. LIEBERMAN. Mr. President, I yield 6 minutes to the distinguished Senator from Washington.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mrs. MURRAY. Mr. President, I rise to support the Climate Stewardship Act offered by Senators LIEBERMAN and MCCAIN and to cosponsor this aggressive plan to fight global warming.

When President Bush walked away from the Kyoto Protocol negotiations in March 2001, he promised the American people he would come up with an alternative. More than 2 years later, the President has yet to deliver on his promise and we simply cannot wait any longer to start making progress.

Here in the Senate we have a worthy plan that will cut greenhouse gas emissions. I want to applaud Senators LIEBERMAN and MCCAIN for presenting this meaningful and comprehensive plan.

The McCain-Lieberman bill will require mandatory greenhouse gas emissions reductions in the United States from broad sectors of our economy. Rather than just aiming to limit industrial emissions—as other plans have done—this legislation will require emissions reductions from four major sectors of the economy: electric utilities; industrial plans; transportation; and large commercial facilities. These four sectors contribute 85 percent of the greenhouse gases produced in America.

The McCain-Lieberman legislation relies on a national ''cap and trade'' system to reduce the air pollutants that contribute to climate change. Many of my colleagues are familiar with this approach. It was first used on a national scale to combat acid rain under Title IV of the Clean Air Act